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ART. I.—HISTORICAL OBSERVATIONS ON THE RESPECTIVE FUNCTIONS OF THE JUDGE AND THE JURY. By M. S. O.

IN all cases of trial by jury, questions of fact are, as a general rule, determined by the jury; questions of law are always determined by the judge or by the court. The application of legal principles depends upon facts, for *ex facto jus oritur;* and the facts must be ascertained before any judgment of the court can be pronounced upon them. Facts are ever varying and shifting, but the rules of law applicable to them should be fixed and certain, and there seems to be a peculiar fitness in the arrangement, that the former should be submitted to a changing tribunal, but one at the same time essentially practical in its character, while the law should be administered by a permanent body devoted to its study and its application upon fixed and scientific principles. It is of very great importance to preserve this distinction between the respective functions of the judge and of the jury, and for this purpose clearly to draw the line between questions of fact and questions of law. If the judge assumes the decision of matters

of fact, he practically abolishes trial by jury; if the jury take upon themselves to determine the law, they involve it in uncertainty and confusion. Lord Mansfield has therefore clearly stated that the fundamental definition of trial by jury depends upon the maxim *ad questionem juris non respondent juratores, ad questionem facti non respondent judices.** This maxim, however, like other principles of our common law, has had some difficulty in maintaining its ground; sometimes it has been disputed, sometimes departed from in ignorance, and often deliberately violated. In former times the rights of juries were not only interfered with during the course of the inquiry before them, but they were also liable to punishment for their verdict; and in addition to the process of attaint, which was established by law for this purpose, they were subject to fines and impositions under a power first usurped by the Star Chamber, and afterwards exercised by the common law judges.

The writ of attaint has been justly characterised as one of the most barbarous and extraordinary modes of impeaching a verdict that could have entered into the imagination of man to devise.† It was executed before a jury of twenty-four, and if they found that the first jury had given a wrong verdict, the attainted jury were liable to the following judgment:—That they should lose their *liberam legem*, and become for ever infamous; that they should forfeit their goods and chattels; that their lands and tenements should be seised into the hands of the king; that their wives and children should be cast out of doors; their houses razed and thrown down; their trees rooted up; their meadows ploughed; and their bodies cast into gaol.‡ The unsuccessful party in the action was also

* *R.* v. *Dean of St. Asaph.* How. Sta. Tr., Vol. xxi, 1,039.

† John Wm. Smith, Action at Law, 147 (5th ed.).

‡ Reeves' "History of the English Law," Vol. II., p. 270. The common law severity of the punishment was commuted into perpetual infamy and pecuniary penalties by 11 Hen. VII., c. 24, and succeeding statutes. The last instance of an attaint found in the Reports occurs in the reign of Elizabeth (Cro. Eliz., 309), and it was formally abolished by statute 6 Geo. IV., c. 60, which provides for the punishment of corrupt jurors.

restored to all which he had lost by reason of the presumed unjust verdict.

Although it was very early laid down that the jury should not entangle themselves with questions of law, yet, as they always possessed the right of returning a general verdict, they, in effect, found both law and fact whenever the general issue was pleaded. As, however, they were liable to attaint in such cases, through merely mistaking the law, the Statute of Westminster 2nd (13 Edw. I., c. 30, s. 2), gave them the power of finding the facts specially, leaving the application of the law to the court. Upon this statute, which was confined to "assize of disseisin," is said to be founded the right of juries to return special verdicts in all cases, civil or criminal.* It has, however, always been in their discretion since the passing of this Statute, to return a general verdict,† and it has, therefore, been necessary to instruct or guide them in the law applicable to the specific facts before them, and this has been the duty of the judge from the earliest introduction of trial by jury.

On some occasions, however, the true province of the jury in this respect has not been sufficiently understood, and judges, instead of directing the jury upon the law, have usurped the power of directing the verdict, which has induced a learned writer to observe, that "in the time of Henry III., it seems to have been considered the duty of the judge to control the verdict of the jury."‡ In the third year of the reign of Edward III. in an action of trespass, when eleven of the jurors had agreed upon their verdict, and the twelfth refused to concur in it, the judge not only took the verdict of the

* *See* Erskine's argument, *R.* v. *Dean of St. Asaph*, How. Sta. Tr., Vol. xxi, 984,; Bl. Com., Vol. III., p. 377.

† Co. Litt., 228 a.

‡ Barrington on Statutes, p. 86, Z. A passage from Bracton was perhaps strained for this purpose. "Though it was commonly said that truth was the province of the juror, and justice and judgment that of the judge, it seems," says Bracton, "that judgment belongs to the jurors, inasmuch as they are to say upon their oath whether one man disseised another. But yet as the judge is to give a just judgment, it becomes him diligently to weigh and examine what is said by the jurors, to see whether it contains any truth, that he may not himself be misled by their mistake."—Reeves' "History of the Law," 1, 331; Bracton, lib. 4, c. 19.

majority, but imprisoned the dissentient juryman. A similar proceeding occurred in the 23rd year of this reign.* But in the 41st year of the same reign, the Court of King's Bench declared such proceedings to be illegal, and refused to allow judgment to be entered upon a verdict thus obtained.† Sir Matthew Hale, referring to these illegal proceedings, says,

"Upon great consideration these courses have been disallowed, and the judgment upon the verdict of the eleven jurors reversed, and the juryman (fined and imprisoned), discharged as being contrary to law; for it may be the twelfth was in the right; yet howsoever his conscience is not in this manner to be forced; and therefore former precedents of this kind have been disallowed." ‡

It appears from this learned writer's "Pleas of the Crown," that down to the time of Charles II., the judges of *Nisi Prius* sometimes fined jurors in civil causes for not giving a verdict according to their direction, even on matters of fact.

"This was done," says Hale, "by a judge of assize in Oxfordshire, and the fine estreated,§ but I, by the advice of most of the judges of England, staid process upon that fine." ‖

It was, however, in criminal cases, and in prosecutions for State offences, that the grievance of this judicial usurpation was most heavily felt. The right of being tried by a jury of one's peers had survived the shock of every political convulsion in our history, yet the encroachments of the judges, often the tools of the Crown, and the usurpation of the Council of the Star Chamber, tended to nullify its advantages,¶ so that from the accession of the House of Tudor to the Revolution of 1688 (during which period the influence of the Crown had become exorbitant), to be accused of a crime against the State and to be convicted were generally almost the same thing.**

* 8 Assiz. 35. † 41 Assiz. 11.
‡ Pleas of the Crown, 160.
§ Justice Hide at Oxford, Vaug. 145.
‖ Pleas of the Crown, 160.
¶ Hallam's Con. Hist. Vol. I., p. 48.
** Hallam's Con. Hist., Vol. I., 48; Hargrave, 1 How. Sta. Tr., 407.

Amongst legal authorities a difference of opinion has always prevailed, as to whether an attaint would lie in criminal cases. According to Sir Matthew Hale, a jury which acquitted a prisoner against evidence, might have been subject to an attaint; but he states his opinion upon this subject very dubiously, and relies for his authority upon the opinion of Thyrnings, a judge of the reign of Henry IV.,* and Chief-Justice Vaughan, Hale's contemporary, lays down quite opposite law in his celebrated judgment in Bushell's case,† saying that "there is no case in all the law of an attaint for the king." Blackstone adopts the opinion of Hale.‡ Barrington, in his learned work on ancient statutes, expressly states that an attaint lay only in civil cases,§ and it would appear that Lord Mansfield agreed with Chief-Justice Vaughan and Barrington, for in the Dean of St. Asaph's case, when Erskine in his argument asserted that the jurors could not be attainted by the Crown, Lord Mansfield assented to this view of the law by saying "to be sure it is so."‖ According to some accounts of the trial of the unfortunate Alice Lisle¶ the jury, having brought her in three times not guilty, were so overcome with fear, upon Jeffreys threatening them with an attaint, that they at last returned a verdict of guilty against the prisoner, and so enabled Jeffreys to perpetrate—what has always been deemed by those who have perused the evidence in this trial—a judicial murder. It is to be remarked that there is no recorded case of an attaint ever having been prosecuted for the Crown in a criminal case. It was by intimidation, by fining juries for returning verdicts against the direction of the court even as to matters of fact, or by summoning them before the Star Chamber, that the judges who during the period of our history before referred to, continued to hold their commissions *durante bene placito*, endeavoured to

* Pleas of the Crown, 310.
† Vaugh., 146.
‡ Bla. Com., Vol. IV., 354.
§ 1 Bar. Obs. on Sta. Westm. Primer, p. 75 (ed. 1766).
‖ How. Sta. Tr., Vol. XXI., 980.
¶ How. Sta. Tr., Vol. II., 297.

serve the Crown by narrowing the boundaries of a jury's lawful functions in criminal cases.

"We are astonished," says Hallam, in his comments on the Star Chamber under the Tudors, "at the easiness with which verdicts were sometimes given against persons accused of treason on evidence insufficient to support the charge in point of law, or in its nature not competent to be received or unworthy of belief. But this is explained by the peril that hung over the jury in case of acquittal." *

The trial of Sir Nicholas Throckmorton † deserves to be considered, not only as illustrating the arbitrary practices of the judges and Crown lawyers, but also the awakening of an independent spirit in juries. Throckmorton was tried in the reign of Queen Mary, in 1554, by a common jury in the city of London on a charge of high treason. The jury returned a verdict of not guilty, upon which the Chief-Justice, Sir Thomas Bromley, remonstrated with them in a threatening tone, saying, "Remember yourselves better. Have you considered the whole evidence?" But the jury remained firm, and their foreman said, "We have found him not guilty, agreeably to our consciences." The arbitrary power exercised by courts of justice at that period was then put in force. The Attorney-General prayed the court that the jury, for their acquittal of the prisoners, should be bound in recognisances to answer any charge which might be brought against them on the Queen's behalf. The court granted more than was desired, and committed the jury to prison. The jury, having been brought before the Council of the Star Chamber, some of them attempting to justify themselves were sentenced to pay heavy fines, and only those who acknowledged their offence were released from imprisonment.

That this arbitrary power was not only fatal to the administration of justice, but that its exercise was even in the reigns

* Con. Hist., Vol. I., p. 49. † How. Sta. Tr., Vol. I., 901.

of the Tudors deemed unconstitutional, appears from the following passage on juries in Sir Thomas Smith's "Treatise on the Commonwealth," written in the reign of Elizabeth.

"If they do pronounce not guilty upon the prisoner, against whom manifest witness is brought in, the prisoner escapeth, but the twelve are not only rebuked by the judges, but also threatened of punishment; and many times commanded to appear in the Star Chamber, or before the Privy Council, for the matter. But this threatening chanceth oftener than the execution thereof, and the twelve answer with most gentle words, they did it according to their consciences, and pray the judges to be good unto them; they did as they thought right, and as they accorded all; and so it passeth away for the most part; yet I have seen in my time, but not in the reign of the King* now, that an inquest, for pronouncing one not guilty of treason contrary to such evidence as was brought in, were not only imprisoned for a space, but a large fine set upon their heads, which they were fain to pay; another inquest for acquitting another, besides paying a fine, were put to open ignominy and shame. But these doings were even then accounted of many for violent, tyrannical, and contrary to the liberty and custom of this realm of England." †

It is evident from the old reports that during the reign of Elizabeth the judges did exercise this power of fining and imprisoning juries, for in the 44th year of that reign it is related that one Wharton, together with others, were indicted for murder and found not guilty; whereupon, in the barbarous, yet quaint, language of the reporter, "Popham, Gandy, Fenner, fuerunt valde irati, et touts les jurors comit et fine, et oblige a lour bon behaviour." ‡ Notwithstanding the protest on the part of Sir Thomas Smith, not only do the judges appear never to have been called to account for such unconstitutional conduct, but some of them, in the reign of James I., went so far as even to recognise the right of the

* The author thus designates Elizabeth, the reigning monarch.
† "Commonwealth of England," by Sir Thomas Smith, Book III. c. 1.
‡ Yelverton Rep., 23.

Star Chamber to call juries to account for their verdicts; for it is recorded in the "Case of Conspiracy,"* that the Chief-Justices, Popham and Coke, and the Lord Chancellor Egerton,† decided that when a party indicted is found guilty on the trial the jury were not to be questioned; "but when a jury hath acquitted a felon or traitor against manifest evidence, there they may be charged in the Star Chamber for their partiality in finding a manifest offender not guilty, *ne malefacia remanerent impunita.*"

The jurisdiction exercised by the Star Chamber, of calling juries to account for verdicts against the Crown, did not cease until the court itself was abolished, in 1641. During the Commonwealth we find but one instance of a jury being questioned for their verdict. This took place on the trial of John Lilburn, in 1653, for returning to England after having been banished by Act of Parliament. The jury having acquitted him were, by an order of Parliament, ordered to appear before the Council of State to answer for their conduct; they did so, and, upon being questioned, their foreman answered, "that he did discharge his conscience in what he did, and that he would give no other answer to any questions which should be asked him upon the matter;"‡ whereupon the Council, which included many who had formerly denounced the Star Chamber for its illegal acts, did not venture to imitate its arbitrary proceedings, but dismissed the jury without imposing upon them any fine or imprisonment.

After the Restoration, those judges who were creatures of the Court, acting upon the precedents set during the reign of the Tudors, began to exercise the power of fining juries for bringing in verdicts contrary to their direction. This was, doubtless, done either with the object of restoring to the Crown the authority over juries which it had lost by the abolition of the Star Chamber, or for the purpose of enlarging the powers of the judges themselves.

* 12 Co. Rep., 23. † Lord Ellesmere.
‡ How. Sta. Tr., Vol. V., 445.

Six years after the Restoration, occurred a case which is deserving of attention, not only as illustrating the arbitrary conduct of a Chief-Justice of England, and his manifest misdirection, for not following which he imposed a fine upon the jury, but also as exhibiting the difference between the temper of the Parliaments of Charles II., and of those which had sat before the Long Parliament of 1640. Chief-Justice Kelyng, of the King's Bench, gives the following report of his own proceedings in this case.

"At Lent Circuit, at Winchester (18 Car. 2), one Henry Hood was indited for the murder of John Newen, and, upon the evidence, it appeared that he killed him without any provocation; and thereupon I directed the jury that it was murder, for the law in that case intended malice; and I told them they were judges of the matter of fact, viz., whether Newen died by the hand of Hood; but whether it was murder or manslaughter was matter of law, in which they were to observe the direction of the court. But, notwithstanding, they would find it only manslaughter, whereupon I took the verdict and fined the jury, of which John Goldwier was the foreman, £5 apiece, and committed them to gaol till they found sureties to appear at the next assizes, and, in the meantime, to be of good behaviour; but after, upon the petition of the jurors, I took down their fines to 40*s.* a-piece, which they all paid and entered into recognizance."*

It is worthy of observation that in this case the Chief-Justice's direction, upon his own showing, was wrong, for he only left to the jury the question whether Newen died by the hand of Hood, while the circumstances of intention on the part of Hood, and of provocation on the part of the prisoner, were as much questions of fact for the jury; for although the law defines the distinction between murder and manslaughter, yet it was for the jury from the evidence to have said whether the facts constituted the greater or less offence.

Attempts were even made to call grand juries to account

* Kelyng, 50.

for their conduct in the finding of bills of indictment, and it appears that such proceedings did not meet with the disapproval of the superior courts of law, for Kelyng having bound over the grand jury of Somersetshire to appear before the Court of King's Bench for having found a bill for manslaughter instead of murder, the jury was discharged by that court, only because it appeared to the judges, "that it was a mistake in their judgments rather than an obstinacy." * Proceedings such as these, which before the civil war would have excited no attention in Parliament, now attracted the notice of the legislature. The conduct of Kelyng having been brought under the notice of the House of Commons, strong resolutions were passed against him, his proceedings were deemed unconstitutional, and it was at first contemplated to proceed against him by impeachment; but the Chief-Justice having extenuated his conduct at the bar of the House, the Commons were satisfied by resolving, "That the precedents and practice of fining or imprisoning jurors for verdicts are illegal." †

Although the Court of King's Bench seems not to have disapproved of the practices of its chief, yet it is gratifying to find that, even in the reign of Charles II., notorious for the subserviency of the judges to the Crown, most of them condemned Kelyng's proceedings, for in two cases in which the fine imposed by that judge had been estreated into the Exchequer, Hale, the Chief-Baron, informs us that he, with the advice of most of the judges, stayed process, ‡ and subsequently, in Wagstaff's case, § it was resolved by all the judges of England, except one, that it was against law to fine a jury for giving a verdict contrary to the court's direction. A jury, of which Wagstaff was one, were fined 100 marks each by Kelyng, for refusing to find certain defendants guilty of keeping a conventicle, under the Act of 16 Charles II. The jury having also been committed till they paid their fines,

* Harg. MSS., v. 339.
† Commons' Journal, 16th Oct., 1667, Hal. Con. Hist. Vol. III., p. 8.
‡ Pleas of the Crown, 310. § Hardress's Rep., 4,091.

brought their *habeas corpus*, and were, after the matter had been solemnly argued before the judges, discharged of their imprisonment.* The observations of Sir Matthew Hale upon this case being very pertinent to the distinctive functions of the judges and the jury, and pointing out forcibly the mischief resulting from Kelyng's unconstitutional practices, deserve attentive consideration.

"It was agreed by all the judges of England," says Hale (one only dissenting), "that this fine was not legally set upon the jury, for they are the judges of matters of fact, and although it was inserted in the fine, that it was 'contra plenam evidentiam, et contra directionem curiæ in materiâ legis,' this mended not the matter, for it was impossible any matter of law could come in question, till the matter of fact were settled, and stated, and agreed by the jury, and of such matter they were the only competent judges. And although the witnesses might perchance swear the fact to the satisfaction of the court, yet the jury are judges as well of the credibility of the witnesses, as of the truth of the fact, for possibly they might know somewhat of their own knowledge, that what was sworn was untrue, and possibly they might know the witnesses to be such as they could not believe, and it is the conscience of the jury that must pronounce the prisoner guilty or not guilty. And, to say the truth, it were the most unhappy case that could be to the judge, if he at his peril must take upon him the guilt or innocence of the prisoner; and if the judge's opinion must rule the matter of fact, the trial by jury would be useless." †

Hale,‡ while abstaining from declaring legal the practice of the Court of King's Bench to fine juries, yet seems to admit that the court possessed such power, founding his opinion solely upon there being precedents warranting this practice. He states that the same course prevailed in the Court of Exchequer, in cases of inquests of office, when jurors did not find title in the king. It is to be remarked that Chief-Justice

* Pleas of the Crown, 312.
† Pleas of the Crown, 312.
‡ *Idem—passim.*

Kelyng's proceedings were an attempt to extend the practice of the King's Bench to Courts of Assize, of *Oyer* and *Terminer*, and to inferior courts; thereby assuming as a judge the exercise of powers which had never been ventured upon by any of his predecessors before the Restoration. Hale denies that any inferior court ever possessed the power to punish a jury for what it deemed a perverse verdict, and strongly reprobates the attempt then made to bring this practice of the King's Bench into use by the judges at *Nisi Prius* and gaol delivery.

Notwithstanding the resolution of the House of Commons, condemning the illegal acts of the judges, and the solemn judgment of Westminster Hall in Wagstaff's case, the practice did not entirely fall into desuetude. Recorders and judges of inferior courts seemed desirous of adopting a practice which had been declared illegal by the superior courts, and it was not till after the celebrated case of Bushell* had occurred, that juries acquired in fact—what they had been entitled to in law—the right to go unquestioned for their verdict.

The case of Bushell arose out of the trial of two Quakers, Penn and Mead, who were indicted in 1670 before the Mayor and Recorder of the City of London, at the Old Bailey, for holding an unlawful assembly.† The jury, of which Bushell was the foreman, returned for their verdict against Penn "Guilty of speaking in Gracechurch Street;" Mead they acquitted. The Mayor and Recorder having in vain attempted to induce the jury to alter their verdict, refused to receive it, and adjourned the case to the next morning, when they returned the same verdict. They were again sent back with a fresh charge, and on the third day, after having been locked up for two nights and deprived of sustenance for forty hours, they returned a verdict of not guilty in the case of each of the prisoners; whereupon the court imposed a fine of forty marks on each of the jury, with imprisonment until it was paid.‡ Bushell, the foreman, being

* Vaughan's Reports, p. 135. † How. Sta. Tr., Vol. VI., 967.
‡ How. Sta. Tr., Vol. VI., 1,001.

committed for non-payment of this fine, sued his writ of *Habeas Corpus* from the Court of Common Pleas, then presided over by Chief-Justice Vaughan. The return* made to Bushell's writ, after setting out the indictment against Penn and Mead, disclosed the following cause of imprisonment:—

"For that they, the said jurors, the said William Penn and William Mead of the said trespasses, contempts, unlawful assemblies and tumults, 'contra legem hujus regni Angliæ, et contra plenam et manifestam evidentiam, et contra directionem curiæ in materiâ legis . . . . acquietaverunt in contemplam domini regis nunc, legumque suarum, et ad magnum impedimentum et obstructionem justiciæ, necnon ad malum exemplum omnium aliorum juratorum in consimili casu delinquentium.'"

In the celebrated judgment delivered in this case by Vaughan, that learned judge, after impugning the return to the writ of *habeas corpus* upon various technical grounds, relied, as Hale does in his remarks on Wagstaff's case, on the argument that a juryman might act upon private knowledge independent of the evidence produced at a trial, which was then an admitted doctrine of law. He then considers—what was even long after this judgment a much controverted question—the legal right of a jury to find a general verdict in criminal cases in which, not only the truth of the facts deposed, but also how far they constitute guilt or innocence of the legal charge, is determined by such verdict. The Chief-Justice then addresses himself to the general principles of trial by jury, his remarks upon which subject, says Mr. Amos, "are to be treasured by every student of this vital part of the English Constitution," † and finally decides after an elaborate argument, that it was against law to fine a jury for giving a verdict contrary to the court's direction, and orders the liberation of Bushell and his colleagues from imprisonment.

* Vaughan's Reports, 136.
† The English Constitution in the reign of Charles II., p. 278.

Mr. Ames, in his remarks on the judgment of this case, observes that —

"The trial in which Bushell had been a juryman took place at a court of sessions before the Lord Mayor and Recorder of London, so that the decision in Bushell's case did not in terminis affect the law as to fining juries for their verdicts by the King's Bench and Court of Exchequer upon inquests of office (as stated by Hale). Nevertheless this is the last time we read, in legal history, of any jury having been fined for its verdict. It is fair to attribute this consequence in a great degree to what passed on the occasion of Bushell's liberation, especially to those forcible arguments of Chief-Justice Vaughan which are of general application to all verdicts of all courts."*

Although the right of a jury to find a general verdict has been recognised since Bushell's case, yet the question as to the province of a jury upon prosecutions for libel gave rise to a remarkable conflict of opinion in our legal history.

Before the passing of Fox's Libel Act in 1792, it had been judicially laid down that on a trial for libel the province of the jury was only to determine the fact of the publication of the alleged libel, and also whether the innendoes were properly laid, that is, whether the libel was published in the particular sense assigned to it; but that the question whether the publication was criminal or innocent was one of law, for the exclusive decision of the court. It was contended that in all cases it is the province of the judges to state the law applicable to a particular class of facts; (as for example, what classes of facts more or less complicated constitute murder or larceny:) that it is the province of the jury to decide whether the case before them is or is not within such class of facts, that is to say to apply to the facts which they find the rules of law as interpreted by the judges: that in these and similar cases the facts not appearing on the record, the case becomes a mixed question of law and fact upon

* The English Constitution. p. 280. *See* the Judgment in Vaughan's Reports.

which the jury is to pronounce a general verdict; but that as it is the law which declares certain facts to constitute murder and other facts to amount to larceny, so it is the law which pronounces what publications are libellous; and as in prosecutions for libel the alleged libel is set out upon the record, the jury are only to find the facts, leaving it to the court to declare whether the publication, which appears on the record, is a libel.*

This anomalous and peculiar mode of charging a jury, which distinguished trials for libel from those for any other offence, appears to have originated soon after the Revolution. In the opinion of Hallam it was introduced by the judges for the purpose of bridling the presumption and licentiousness of a press just emancipated from the trammels of a censorship, which was suffered to expire with the last Licensing Act, in 1693.†

Although long before Lord Mansfield's charge to the jury on the trial *King* v. *Woodfall*,‡ the law had been settled as laid down in that case, yet an examination of the cases prior to the Georgian era will show that the distinction between the functions of the jury on trials for libel and those on prosecutions for other offences, had not always prevailed, and that it was therefore true to assert, as Lord Camden and others did, that the doctrines of those judges, adopted and followed by Lord Mansfield, were contrary to the common law.

"After the abolition of the Star Chamber, which, in cases of libel, exercised an unbounded control over both law and fact, the cognizance of such offences reverted to the Court of King's Bench, to be exercised in the constitutional mode by the intervention of a jury; and till some time after that period, no doubt seems to have been entertained of the right of a jury to give a general verdict in the case of libel, as well as in any other criminal proceeding."§

* Hal. Con. Hist., Vol. III, 169; and *see* Starkie on Libel, *passim*.
† *Idem*, 167-8.
‡ *Rex* v. *Woodfall*, 5 Barr., 2,661. § Starkie on Libel, 355.

Thus on a trial in the reign of Charles II., for publishing a libel on the administration of justice, the object of the publication being to prove that certain persons had been improperly convicted for the murder of Sir Edmundbury Godfrey, Chief-Justice Pemberton concluded his summing up to the jury by saying—

"Gentlemen, I do leave it to you, whether, upon this evidence, you do not believe the defendants to be guilty of this design of traducing the justice of the nation."*

In the famous case of the Seven Bishops † which was a trial at bar, there was a difference of opinion amongst the judges as to whether the petition presented by the prelates to the king, which was the subject of the information, was libellous; but the question whether the document was a seditious libel was distinctly left by the judges to the determination of the jury, who moreover, when they retired to consider their verdict, were permitted to take with them the petition to form their own opinion thereon. Thus Chief-Justice Wright, after referring to the sufficiency of the evidence to prove the publication of the petition, said, "we must therefore come and inquire whether it be a libel," and then gave his reasons for so deeming it, for the purpose of enabling the jury to give their verdict. Holloway (J.) followed, and after giving his opinion on the nature of the publication, addressing himself to the jury, said, "It is left to you, gentlemen;" and Powell (J.), who stated that the petition was no libel, concluded his summing up by saying to the jury, "But the matter of it is before you, and I leave the issue of it to God and your own consciences."‡ Even so late as the reign of Queen Anne,

* *R.* v. *Farwell and others*, How. Sta. Tr., Vol. VIII., p. 1,361.

† How. Sta. Tr., Vol., XII. 183.

‡ It cannot be doubted that the issue of this memorable trial was owing to the jury exercising their judgment on the whole charge, and as the majority of the judges had given an opinion that the petition was libellous, if the question had been withdrawn from the jury, some may be inclined to agree with Erskine (21 State Trials, 1,014) that if the king's judges could have decided the petition to have been a libel, the Stuarts might yet have been on the throne.

upon the trial of Tutchin for libel, Lord Holt, notorious for his hostility to a free press, left the question of libel or no libel to the jury, saying, "Now you are to consider whether these words which I have read to you, do not tend to beget an ill opinion of the administration of the Government."*

There is, however, one reported case which occurred prior to any of those above stated, which may be cited as a precedent for the practice prevailing immediately before the passing of the Libel Act. It is that of Udal, a puritan minister, who was indicted in the reign of Elizabeth, on a statute of that reign † which rendered the publication of seditious libels against the Queen's Government a capital felony. In this case the jury were told, that the only matter of fact for their consideration was, whether the defendant was the author of the libel, and that the question whether the writing was a libel was a question of law for the court.‡ As Udal was indicted upon a particular statute, and, as Hallam says, the mode of conducting his trial disgraces the name of English justice,§ this case cannot be deemed an authority against those previously referred to.

The judicial doctrine that it was exclusively the province of the court to say whether the meaning of a publication was criminal or not, seems then, from an examination of the cases upon the subject, to have come into vogue soon after the accession of the House of Brunswick. In the case of the *King* v. *Clark*, which was an indictment for publishing a seditious libel, Chief-Justice Raymond held that the question whether the publication was malicious was immaterial for the jury. The doctrine thus shadowed forth in the case just cited, was stated by the same judge to be the law, in clear and unmistakable language, in the case of Franklin,‖ indicted for publishing a libel upon the king and his government, in the *Craftsman* newspaper; for in Lord Raymond's charge to

* How. Sta. Tr., Vol. XIV., 1128.
† 23 Eliz., c. 2.
‡ How. Sta. Tr., Vol. I., 1277-89.
§ Hal., Con. Hist. Vol. I. 2061.
‖ How. Sta. Tr., Vol. XVII., 672.

the jury he tells them that the question whether the defamatory expressions in the writing amount to a libel or not,

"Does not belong to the office of a jury, but to the office of the court, because it is a matter of law, and not of fact; and of which the court are the only proper judges."

An examination of the reported cases of libel from this time to the time of Lord Mansfield, will show that the doctrine thus enunciated from the bench, was universally adopted by the judges. To prove this, reference need only be made to the charges of Chief-Justice Lee, in *King* v. *Owen*,* and of Justice Ryder in *King* v. *Nutt*;† and Lord Mansfield states that in *King* v. *Shebbeare*, which was tried before him, he gave the same direction to the jury, and adds that no counsel ever complained of it to the court.‡ It must, however, be observed, that the doctrine which throughout a long series of years was acquiesced in by the legal profession, was not always assented to by them; for Lord Camden, in the debate on the Libel Act, stated that in this very case of the *King* v. *Shebbeare*, the prosecution of which he conducted as Attorney-General, he went into court predetermined to insist on the jury taking the whole case into consideration, and—

"So little," added he, "did I attend to the authority of the judges, that in arguing the character of the libel, I turned my back upon them, directing all I had to say to the jury box."§

It is also worthy of remark that juries sometimes openly disregarded the law thus laid down by the judges. This is illustrated in a remarkable manner by the conduct of the jury in Owen's case.‖ Chief-Justice Lee delivered his opinion that the jury ought to find the defendant guilty; for he thought the fact of publication was fully proved, and if so

* How. Sta. Tr., Vol. XVII., 1222.
† Per Lord Mansfield, 3 Term Rep. 428 notes.
‡ How. Sta. Tr., Vol. XXI., 1038.
§ Campbell's "Lives of the Chancellors," Vol. VII., 45.
‖ How. Sta. Tr. Vol. XVIII., 1222.

they could not avoid bringing in the defendant guilty. The jury, notwithstanding, having returned a verdict of not guilty, were, at the desire of the Attorney-General, asked this question; "Do you think the evidence laid before you of Owen's publishing the book by selling it, is not sufficient to convince you that the said Owen did sell the book?" upon which the foreman, without answering the question, said, "Not Guilty;" and several of the jurymen said, "That is our verdict, and we abide by it;" insisting thereby upon their established right to give a general verdict, in spite of the judge's summing up.

Such were the doctrines laid down by the judges, and acquiesced in till 1770, when the case of Woodfall* occurred, memorable as that in which the correctness of these doctrines was first disputed, and which, with the subsequent case of the Dean of St. Asaph, led the way to the abolition of that anomalous jurisdiction exercised by the court in cases of libel. In Woodfall's case an information had been filed by the Attorney-General against the defendant, for publishing one of Junius's letters which was alleged to be a libel. Lord Mansfield, before whom the trial took place, charged the jury that there were only two points for their consideration; the first, the printing and publishing the paper in question; the second, the sense and meaning of it; and that as to the charge of its being malicious and seditious, they were mere inferences in law, with which the jury were not to concern themselves, and that if there was nothing criminal in Junius's letter, their verdict of guilty would do no harm; for the jury would consider that the court was the only judge of that. The jury having found the defendant guilty of printing and publishing only, a *venire de novo* was granted. In the argument before the court, the direction of the Lord Chief-Justice having been animadverted upon, Lord Mansfield in delivering judgment stated that whether the paper was a libel was a question of law upon the face of the record, and that from indispensable

* How. Sta. Tr., Vol. XX., 900.

duty he had been obliged so to tell the jury, as upon every trial of the kind.* This judgment gave rise to a violent controversy both amongst lawyers and statesmen, Lord Camden strongly maintaining that the doctrine of Lord Mansfield was contrary to the common law, that the jury was to decide the question of libel or no libel, and that in prosecutions for this offence the jury should decide upon the whole case; and the Lord Chief-Justice of the King's Bench supporting the decision of his court. But the history of this phase of the controversy is political rather than legal, having been transferred from the courts of law to the Parliament and the press.

In 1783, thirteen years after Woodfall's case, the celebrated trial of Dr. Shipley, the Dean of St. Asaph, for libel† took place. He was indicted for publishing a pamphlet on Parliamentary reform, written by Sir William Jones, which was alleged to be a seditious libel against the king and his government. The case was tried before Mr. Justice Buller, and it was affirmed for the prosecution that if the jury believed that the defendant caused the pamphlet to be published, and that the inuendoes were supported, that they were bound to convict. Erskine appeared for the defendant, and boldly impugned the doctrine maintained to be law by the judges; asserting that the jury possessed both the power and the right of deciding whether the publication was a libel.‡ Mr. Justice Buller in his summing up overruled all that had been contended for by Erskine, and stated that there was no one question in law more thoroughly established than that the criminality of a publication alleged to be libellous was a question for the court. Having then intimated that he should not himself give an opinion on the nature of the publication, but leave it to the court, he concluded by thus charging the jury; "Therefore I only say, that if you are satisfied that the defendant did publish this pamphlet, and are satisfied as to the truth of the inuendoes, you ought in

* How. Sta. Tr., Vol. XX., 918.
† How. Sta. Tr., Vol. XXI., 847. ‡ *Idem*, 928.

point of law to find him guilty."* The jury brought in a verdict of "Guilty of publishing, but whether a libel or not we do not find." In the ensuing term, Erskine moved the Court of King's Bench to set aside the verdict for misdirection by the judge in his charge to the jury, and obtained a rule to show cause why there should not be a new trial.

In moving for and in afterwards supporting the rule, Erskine, in speeches remarkable for the cogency of their reasoning and the purity of their style, combated the distinction which had been taken between libels and other offences, and maintained that upon a plea of not guilty, or upon the general issue pleaded to an indictment or information for a libel, the jury had not only the power, but a constitutional right, to examine into the character of the paper charged as a libel. After solemn argument† the rule was discharged, Lord Mansfield, in delivering the judgment of the court, maintaining the law which he had laid down in Woodfall's case, and declaring the direction of Justice Buller was agreeable to the uniform judicial practice since the Revolution.

Referring to Lord Mansfield's judgments in the cases of Woodfall and the Dean of St. Asaph, Lord Campbell says,

"I think his doctrine that the jury were only to find the fact of publication and the inuendoes, contrary to law as well as liberty. His grand argument for making the question of libel or not exclusively one of law, that the defendant may demur or move in arrest of judgment, and so refer it to the Court, admits of the easy answer, that, although there may be a writing set out in the information as libellous, which it could, under no circumstances, be criminal to publish, yet that an information may set out a paper, the publication of which may or may not be criminal, according to the intention of the defendant, and the circumstances under which it is published. Therefore supposing judges to be ever so pure, upright, and intelligent, justice could not be done by leaving to them the criminality or

* How. Sta. Tr., Vol. XXI., 945-950.

† An able analysis of the arguments on both sides of the question will be found in "Starkie on Libel," pp. 347-354.

innocence of the paper alleged to be libellous, as a mere abstract question of law, to be decided by reading the record.

"Nevertheless there are various authorities for the rule which Lord Mansfield had laid down, and in laying it down, he not only followed the example of his immediate predecessors, but he was supported by the unanimous opinion of his brethren who sat by him."*

It must be admitted that an examination of the cases cited by Lord Mansfield in these judgments, proves that the practice held to be legal by the Court of King's Bench had been followed since the Revolution, but a perusal of the cases referred to in a previous part of this article will also justify the conclusions at which Lord Camden and Erskine arrive, that such practice was an innovation and contrary to the common law. It might have been expected that this famous judgment of Lord Mansfield would have established for ever the fatal doctrine that libel or no libel was a question of law for the determination of the judges. Lord Kenyon, Lord Mansfield's immediate successor, acted upon it, and his charge to the jury was not disputed.† The legal profession seemed to acquiesce in the decision of the eminent chief of the King's Bench, but the public became alarmed as to its effect on the liberty of the press. This led to the passing of Mr. Fox's celebrated Libel Bill,‡ which defined the rights of the jury and the functions of the judges in trials for libel. The Act was passed in 1792, and notwithstanding all the judges, when summoned by the House of Lords, declared that the proposed enactment was inconsistent with the common law,§ yet the legislature adopted the views of Erskine, and it was passed as a declaratory Act, enacting that on every trial of an indictment or information for a libel, the defendant having pleaded not guilty, the jury upon the issue thus raised may give a general verdict of guilty or not guilty, and shall

* Campbell's "Lives of the Chief Justices," Vol. II., 48.
† *R.* v. *Withers*, 3 T. Rep., 428.
‡ 32 Geo. III., c. 60.
§ Parliamentary Hist., Vol. XXIX., 1361.

not be required or directed by the presiding judge to find the defendant guilty merely on proof of the publication by him of the paper charged to be a libel, and of the sense ascribed to the same in such indictment.

It has been contended by some legal authorities that this statute has not made the question of libel or no libel a question of fact. That as the Act was declaratory it was only designed for the purpose of putting prosecutions for libel on the same footing as other criminal cases, and that the question whether a publication be libellous still remains a question of law, the jury being bound in conscience to find a verdict of guilty if the judge charges them that the publication alleged to be libellous is criminal.* It must be evident to everyone who has perused the cases of libel which have been reported since the enactment of the Libel Act, and who is acquainted with the daily practice of the Courts, that such opinions are untenable, and that the Act in question has made an important alteration in the practice which prevailed in Lord Mansfield's time, since it enables the jury to consider whether the libellous matter has the tendency which makes it criminal, which that eminent judge reserved entirely for the Court.

The universal practice now is to charge the jury whether the publication alleged to be libellous has that character;† "For the Libel Act," says Hallam,‡ "was certainly designed to turn the defendant's intention, as it might be laudable or innocent, seditious or malignant, into a matter of fact for their (the jury's) inquiry and decision." The alteration in the law effected by this important Act, is thus clearly stated by Lord Campbell:—

"The judgment in the Dean of St. Asaph's case led to the subversion of the doctrine that libel or no libel was a pure question of law, and the establishment of the liberty of the press under the

* *Vide* Starkie on Libel; Forsyth on Trial by Jury; Best (J.), in *R.* v. *Burdett*, 3 Barn. & Ald., 131.

† Cooke on Defamation, p. 272; Judgment of Lord Wensleydale in *Parmetur* v. *Copeland*, 6 M. & W., 105.

‡ Con. Hist., Vol. III., 170.

guardianship of English juries. The public mind was so alarmed by the consequences of this decision, that Mr. Fox's Libel Bill was called for, which declared the rights of jurors in cases of libel."*

And again, in his life of Lord Camden, the same author observes:—

"We have now the best definition of a libel—a publication which, in the opinion of twelve honest, independent, and intelligent men, is mischievous, and ought to be punished."†

Art. II.—LEGAL POSITION OF THE CHURCH OF ENGLAND.

A Collection of the Judgments of the Judicial Committee of the Privy Council in Ecclesiastical Cases relating to Doctrine and Discipline; with a Preface by the Lord Bishop of London, and an Historical Introduction. Edited (under the direction of the Lord Bishop of London) by the Hon. George C. Brodrick, Barrister-at-Law, and Fellow of Merton College, and the Rev. William H. Fremantle, Chaplain to the Bishop of London, and late Fellow of All Souls' College. London: John Murray. 1865.

THE Bishop of London has done the state good service by the present publication, which gives us the true theory, the correct history, and the actual working of the Court of Final Appeal in Ecclesiastical Causes. The first of these will be found sketched with sound judgment and discrimination by his lordship in the preface, the second in the elaborate and valuable historical introduction, and the last in the judgments themselves, which have been carefully edited, and presented in a convenient form. An appendix has been added, containing the judgment in *Long* v. *the Bishop of Cape Town*, which did not come before the judicial committee as an ecclesiastical

* Lives of the Chancellors, Vol. VIII., 279. † *Idem.*, Vol. VII., 47.

cause, an account of the different proceedings against Whiston before the Vice-Chancellor and heads of houses at Cambridge, before Convocation, and before the Court of Delegates, and of the principal proceedings in the celebrated case of *Lucy* v. *The Bishop of St. David's* in the various courts before which it came, and the judgment in *The Procurator-General* v. *Stone* in the Consistory Court of London, and that in *Breeks* v. *Woolfrey* in the Court of Arches. All these cases, although not coming within the purview of the present work, throw important light on the character and constitution of the Church of England, and have been therefore very properly added by the editors. No publication could be more opportune than that now before us, with reference to the very foolish excitement which has recently prevailed amongst certain of the clergy on the subject of the Court of Appeal in Ecclesiastical Causes, but which every true friend of the Church must have looked upon with feelings bordering on dismay. There can be no greater enemies of the Church of England that those who put forward her claims on false grounds; and every sound exposition of the solid basis on which she stands is therefore exceedingly valuable at a time when so many absurd and fantastical notions are advanced by those who support, not the real Church established amongst us, but a mere creature of the imagination, which has no foundation either in reason, in history, or in law.

The preface by the Bishop of London is a grave, impartial, and learned exposition of the historical and political grounds on which the present system of appeal rests; and disposes very quietly, but very effectually, of a multitude of objections and fanciful notions which have been lately obtruded by certain sections of the clergy on the public. There are some expressions of his lordship to which we should be inclined to take exception, as when he talks of "the original contract according to which the relations of Church and State were settled," which appears to us to imply something as entirely imaginary as Locke's theory of an original contract as the

foundation of civil government. Occasionally it seems as if his lordship thought that the Church of England had an existence separate from that of the nation, and some authority independent of that given to it by the law. We shall have occasion to touch on this matter at some length in the sequel of this article, and we need not therefore refer to it further at present. But we have no hesitation in saying that his lordship's views on the Court of Appeal are in accordance with the law as it exists, and with what we must consider as the only sound policy on the subject. As at present advised, he is entirely in favour of keeping the court as now constituted, and he looks with anything but favour on some of the changes that have been proposed in certain quarters.

With respect to the historical introduction, we can only say that we feel deeply indebted to its author for the very interesting and important information which it contains. A vast amount of matter bearing on the subject, which has hitherto been almost inaccessible to the profession, is here laid before the public. He must be a very bold or a very weak man who, after reading this carefully prepared essay, can maintain that there is the slightest pretence whatever for thinking that a spiritual tribunal, as the ultimate court of appeal, ever had any place in the reformed Church of England, or ever can have any place in that institution, consistently with the legal character which it possesses. The author has certainly, to our minds, fully established the point, that "the constant practice, since the appeal to Rome was abolished at the Reformation, and the royal supremacy was asserted, has been that laymen should form the larger part of the appellate tribunal, but that ecclesiastics also should usually have a place in the court, when doctrine and discipline were affected."

The author of the historical introduction has very justly observed that the subject-matter with which the Court of Appeal has to deal "is such that the application to it of legal maxims is not easy, and there would be danger, in any but able and impartial hands, of losing the clue of simple justice

which should be the guide in all the administration of the law." In proceedings against clergymen for immorality the question is generally one merely of evidence, and although the evidence is not presented in the most convenient form, the court can have no extreme difficulty in applying the ordinary legal rules, and judging as they best can of the value and weight of the testimony for or against the defendant. The imperfect nature of written evidence, however, renders the utmost care necessary even in such cases, and demands the exercise of a practised judicial mind, if injustice is not to be done. But the moment we come to questions of doctrine or questions of ceremonies and ornaments, the most skilful common or equity lawyer must feel that he has entered on a strange and shadowy land. He leaves the definite rules of the common law, or the broad principles of equity, and descends into a region where the light is uncertain and the paths intricate.

> "Quale per incertam Lunam sub luce maligná
> Est iter in sylvis."

Take for example the celebrated judgment delivered by Lord Brougham in *Escott* v. *Mastin*, on the validity of lay baptism. Nothing could be sounder, we think, than the result arrived at; but there was no principle which his lordship could lay hold of, and the only materials which were available were scraps of rubrics and formularies, which are always quaint, and often not free from much obscurity. So in *Gorham* v. *The Bishop of Exeter*, Lord Langdale in his admirable judgment had to grope his way through a vast mass of complex and contradictory articles and formularies, and arrived at his conclusion, rightly we think, but by one of the narrowest paths on which the human intellect ever trod. But one of the best illustrations of what we mean is supplied by the judgment of Lord Wensleydale in *Liddell* v. *Westerton*. We do not say that in reading this judgment we feel, as Mr. Justice Buller describes those who listened to the judgments of Lord Mansfield, as "lost in admiration at the strength and stretch

of the human understanding." But the manner in which Lord Wensleydale has gone into all the different questions connected with church furniture and ornaments charged as illegal, and has allowed this and disallowed that, guided only by a law of the most imperfect, fragmentary, and yet entangled nature, is at least a judicial feat to which we willingly give the homage of our admiration.* In dealing with such cases as we have mentioned no one but a veteran judge would be able to steer his course clear; and as to any ecclesiastic pretending to give a judgment on such matters, the only course open to him would be to decide on the simple consideration of what was best for the interests of the Church; of which *ratio decidendi* the same may be said as of a judge deciding on considerations of public policy, that it is a hobby which may carry a man who mounts it anywhere; the *where*, however, not being altogether a matter of chance, since, as the late Mr. Baron Alderson once observed, the explanation may generally be found in the lines of Cowper:—

> "For why? His owner had a house
> Full ten miles off, at Ware."

We do not of course mean that it would be a mere private house to which a clerical judge would be thus carried, but the house of bondage which each of the two great parties among the clergy has erected for itself and identified with the National Church.

We have passed somewhat lightly over both the historical matter and the collection of judgments which this volume contains, as well as the questions of policy which the subject of the Court of Final Appeal involves, because it was only in our last number that we treated on these matters at some length, and we could not therefore discuss more minutely the

* This was not the first time that Lord Wensleydale showed his aptitude for dealing with a question of ornaments. See his judgment in *Peters* v. *Flemying*, 6 M. & W. 46, on the question as to whether a breast pin and gold chain could be considered as necessaries for an undergraduate at Cambridge, the eldest son of a Member of Parliament, who was also a gentleman of fortune.

contents of the present volume without going over much of the same ground which we have so recently traversed. Although the volume supplies us with much fuller historical information than we then possessed, it has only confirmed by the ampler stores of learning which it unfolds the statements which we have already laid before our readers; and with respect to the views on questions of law and of policy connected with the subject which we propounded in the article alluded to, there is nothing that is at all material which the present book does not strengthen and fortify. We are anxious however, to make a few observations on a subject which underlies the whole question of the Court of Final Appeal, and the correct apprehension of which affords the solution of a multitude of difficulties with which many persons disquiet themselves in vain. We allude to the legal position of the Church of England, and the relation in which the system of doctrine, government, and worship which obtain in it stands to the law.

Now on this subject we are very humbly of opinion, that both High Churchmen, and Dissenters who object to the principle of an established church, labour under a very grievous fundamental error, which is substantially the same in both, but which of course affects each of these two different sets of persons *ad modum recipientis*. Both equally maintain that the State has no right to regulate Church government and religious doctrine, but they differ in this, that while the latter hold, what is a very plain matter of fact, that the Church of England depends wholly on legislative enactment, and draw from this the unwarrantable inference that it is a bad institution, the former assume that the Church has an independent authority which is not affected by any parliamentary restrictions, to which, in their opinion, it has voluntarily submitted; far less by those which it may choose to consider as usurpations. However much we may differ from the views of Dissenters in this matter, we have no desire to enter into a question which is a fair subject for argument, but the discussion of which would be unsuitable to our pages. The sublime disregard for

history and law which the theory of the other party implies, is only deserving of a moment's consideration for the reason we have already stated.

The whole constitution of the Church of England, its laws, articles, and formularies, no less than the civil rights which belong to its beneficed clergy and bishops, must be regarded as forming a part of the law of the land; and there is nothing either in the statutes relating to this matter, or in the articles and formularies of the Church, to show that it claims to have any authority over the people of this country, except what arises from the voluntary consent of the nation as represented by the legislature. In other words, the Church of England presents itself to us, not as having any divine right to the position which it occupies, but as being the system of doctrine, worship, and government, which, on the whole, the people of this country consider as the best system, as most conformable to the purest ideas of Christianity, and as most likely to be beneficial to the spiritual interests of the community. Whether such views, theologically considered, are right or wrong, we are not now arguing; we only maintain that such is the legal position which the Church of England occupies, and we confess that we cannot form an idea of the Church of England without its legal position, any more than Martinus Scriblerus could of a lord mayor without his gold chain and furred gown, although of course for an opposite reason. The legal position of the Church of England is, in fact, its substance; and whatever accidents of a superhuman character it may possess in the opinion of some, these are matters of faith, as to which, it may naturally be supposed, that under the circumstances many men will be of many minds.

As we have already intimated, we think that the notion of a compact between Church and State, as two independent parties, is the merest fiction in the world. The consent of the Church was never asked to the different Acts of Supremacy and Uniformity, unless we are to take the celebrated Act of Submission made by the clergy, by which they divested themselves of

all legislative power, and which is referred to in 25 Hen. VIII. c. 19, s. 1, as amounting to such consent. When, in the first year of the reign of Edward VI., the lower House of Convocation applied to have the liberty of sitting with the Commons in Parliament—or if this privilege were refused them, that no law regarding religion might pass without their consent and approbation—the demand was rejected. The contract with the Church as a body, which the Acts we have referred to are supposed to imply, is of an entirely novel description, being not even unilateral, but consisting of a plain direct command on one side, to which only obedience could be the answer on the other. To individual clergymen, indeed, they prescribe the terms on which they can hold their livings, but of the Church as an independent body they make no account, and neither recognise it expressly or by implication.

The statute 1 Eliz. c. 1, while it enacts (s. 16) that all usurped and foreign power and authority, spiritual and temporal, should for ever be extinguished within the realm, provides also (s. 17) that such jurisdictions, privileges, superiorities, and pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority had theretofore been or might lawfully be exercised or used for the visitation of the ecclesiastical estate and persons, and for reformation, order, and correction of the same, and of all manner of heresies, schisms, abuses, offences, contempts, and enormities, should for ever be united and annexed to the imperial crown of the realm. It is impossible that language could more clearly declare the subordination of the ecclesiastical estate and persons to the Crown, and this statute is the foundation on which the Church of England was then placed, and still remains.

The only matters, in truth, in the whole history of the Reformation in England, in which anything real was done by the clergy, were the compiling the Book of Common Prayer, and the framing the Articles of religion; but in both their opinion was only taken as men of skill, not as having any special authority on such matters which was binding on the

legislature, as the language of the different Acts of Uniformity abundantly shows; and it is from these Acts alone that the Book of Common Prayer and the Articles derive their authority in the Church of England. So little importance indeed was attributed to mere ecclesiastical authority in the matter of rites and ceremonies, that by the Act of Uniformity (1 Eliz., c. 2, s. 26), power was given by the Parliament to the Queen, by the advice of the commissioners or of the metropolitan, to ordain and publish such further ceremonies and rites, in addition to those contained in the Book of Common Prayer, "as might be most for the advancement of God's glory, the edifying of His Church, and the reverence of Christ's holy mysteries and sacraments."

There is no intimation whatever in any of the Acts of Uniformity, that the Church, considered as a distinct body, had any right to frame articles of religion which should be binding on the community. The Convocation which settled the Articles in 1562, could scarcely, indeed, consider itself as the Church, or even as representing the Church; for the 19th Article expressly defines the Church to be "a congregation of faithful men," which, of course, includes the laity, who were never supposed to be even virtually represented in Convocation. The truth is, that all that Convocation did, in substance, was merely to give advice on points of doctrine referred to them, and the real "authority in controversies of faith," which the 20th Article as it now stands mentions, was exercised by Parliament, as representing "the congregation of faithful men," in passing the 13 Eliz., c. 12 (until which time the Article had merely been "put forth by the Queen's authority,") because Parliament alone represented the Church; that is, "the congregation of faithful men," which was certainly intended to mean the nation at large.* The Act itself is intituled, "An Act for Ministers

* *See* a passage on the Church and the Commonwealth as the same society considered under different relations, in the eighth book of the "Ecclesiastical Polity." Hooker says, "We mean by the Commonwealth that society with relation to all the public affairs thereof; by the Church, the same society with only reference unto the matter of true religion."

of the Church to be of Sound Doctrine," which clearly implied that Parliament took upon itself to determine what was sound doctrine.

To show how entirely the idea of there being any distinct body of men possessing divine authority in matters of religion, was absent from the minds of those who settled the Church of England on the basis which it still occupies, we have only to read the 23rd Article, which is as follows:—

"It is not lawful for any man to take upon himself the office of publick preaching, or ministering the sacraments in the congregation, before he be lawfully called and sent to execute the same. And those we ought to judge lawfully called and sent, which be chosen and called to this work by men who have publick authority, given unto them in the congregation, to call and send ministers unto the Lord's vineyard."

Here the authority of those who are to call and send ministers, is a "publick authority given unto them in the congregation;" words which it is utterly impossible to twist and torture into meaning "authority derived by transmission of orders from the apostles." Taken in connection with the 19th and 20th Articles, these words unquestionably mean "authority given by the congregation of faithful men," which no doubt means the nation at large, considered as a Christian community. Those who were to exercise this authority were the bishops, not as having divine right, but as having "public authority given unto them in the congregation." True it is that the language of the ordination and consecration services, and especially of the preface, seems to go further, but when read in connection with the 23rd Article, it only means that there have been three orders in the Church since the time of the apostles, which is merely the assertion of an historical fact, imperfectly apprehended, and which may be considered as the ground, or one of the grounds, on which the episcopal form of government was adopted by "the congregation of faithful men," but which involves no theory of the exclusive transmission of spiritual prerogatives in one channel: and, in

point of fact, it is perfectly well known that no such theory was then held, nor, as Bishop Burnet says, for eighty years after the Articles were published.* It was only after the Presbyterians set up the divine right of their system, and when an entirely new set of questions had arisen, that the notion of the divine right of bishops began to arise in the Church of England; but it is clear that when the Church was settled at the Reformation, the views which prevailed were of a much more rational and moderate description. Indeed, until the Act of Uniformity, 13 & 14 Car. II., c. 4, ss. 13, 14, there was no law to prevent ministers not episcopally ordained holding benefices in the Church of England, as in point of fact they often did.

But to show more clearly what the Church of England considers itself to be, let us examine the 19th Article, to which we have above referred. The Article is as follows:—

"The visible church of Christ is a congregation of faithful men, in the which the pure word of God is preached, and the sacraments be duly administered, according to Christ's ordinance, in all those things that of necessity are requisite to the same."

Now this being the definition of the visible Church which the Church of England adopts, it is clear that it does not identify itself with some ideal body which had preserved the true apostolical succession, or consider itself as having greater affinity with the Church of Rome, or the Greek Church, as some would have us suppose, than with the other reformed churches. Nothing is here said about the apostolical succes-

* "Burnet on the Thirty-nine Articles." See Exposition of Article xxiii. It may be interesting to quote here a sentence of Lord Bacon, on foreign churches, which occurs in his treatise, "Of the Regulation of the Church of England," dedicated to James I. "But to compare our own with foreign churches, I would rather compare them in virtues than in defects; or rather as the vine and the olive, to see which was most fruitful, than as the briar and the thistle, to discern which was the most unprofitable." Speaking of "one form of discipline," he says—"But for my part, I confess, that in reading the Scriptures, I could never find any such thing; but that God had left the like liberty to church government as He has to the civil government, to be varied according to time, place, and accidents, which, nevertheless, His high and divine providence orders and disposes."

sion of bishops as a "note" of the true Church; nor is it possible to put on the Article the wretched gloss, that the words "those things that are requisite to the same," mean that the sacraments must be administered by those who have been ordained by bishops who have derived their orders from the apostles, because every one who knows anything of the history of the Reformation must be aware that these words refer only to the forms and elements used in the sacraments, and especially to communion in both kinds. It may be that apostolical succession is necessary to make a true church, but this is certainly not the doctrine of the Church of England. Can it be doubted by any one that the words of this Article pointed to the reformed churches, and that those who framed it believed that these churches formed part of the visible Church? Where is there any suggestion in this or the 23rd Article of an exclusive priesthood, with perpetual succession, having divine authority, by virtue of such succession, to preach the word and administer the sacraments, and being independent of the Christian community?

The key to a true knowledge of what the Church of England claims to be, is to be found in the definition of the visible Church in this Article. The Article states what is the visible Church generally, but of course the church of any nation is the "congregation of faithful men" of that nation. The term "congregation" was intended to describe the nation viewed in its religious aspect, and was used in this sense in other reformed churches, as well as in the Church of England. It was so used in Scotland, as the expression "Lords of the Congregation," applied to the nobility who took the lead in the Reformation in that country shows. But there was the same idea in all the countries where the reformed doctrines were established. The idea of the Church was never dissociated from that of the nation at large; and the power of determining what the doctrines and government of the Church were to be was in all cases considered as belonging to the nation, and to be exercised by it in some way or other.

This in fact was the fundamental principle of the Reformation, and without adhering to it there was in reality no answer whatever to the claims of the Church of Rome. Unfortunately, in Scotland, when matters came to be settled, the principle, though not departed from, was applied in an erroneous manner. The legislative power and judicial authority of the Church were not retained by Parliament and the Crown, but were vested in bodies composed both of clergy and laity, though still with a national aspect. The natural consequence of this was, as might be supposed, that the laity soon became the mere tools of the clergy, and the established church in that country lost by degrees the national character which it once had, and which it is still the glory of the Church of England to possess.

On the whole, then, we are clearly of opinion that the true theory of the Church of England is that it is the nation at large viewed as a religious community, represented by Parliament in matters legislative, and by the Crown in matters executive. The clergy are those whom it employs in preaching the doctrines which it considers as Scriptural, and in administering the sacraments which it considers as true. It adopts episcopacy because it has existed from the "apostles' time" and is otherwise expedient, and it gives the bishops public authority to call and send ministers. It is only on this theory that the history of the Church during the period of the Reformation, and the legislation which then took place, are at all capable of a rational explanation. In any other view they —and the Church itself—are a perplexity and an enigma. We do not mean to say that there are not some cross-currents to be found, but these are of a minor character, and the broad stream clearly flows on in the direction we have indicated. It was only to be supposed that some of the effects of the superstitions which had lasted for ages should still remain, and should occasionally show themselves in some of the formularies which were retained, and in some of the notions which prevailed; but the essential character of what then took place is certain and unequivocal, and there can be no mistake as to the

leading idea under which those acted by whom the existing settlement was effected.*

Although the legislative power of the Church of England was kept wholly in the hands of Parliament, the judicial was allowed to remain in the Ecclesiastical Courts, subject to appeal to the Crown. But no one can imagine that it was on any ground of right that these courts were retained. If it had been thought expedient, there was nothing to prevent their jurisdiction being transferred to the ordinary courts of law; and in fact Mr. Justice Blackstone in his Commentaries more than once expresses his regret that this was not done, and the old system restored which prevailed in the Saxon times before the Papal usurpations. The real difficulty in doing so was an entirely practical one, viz., the incompetency of the Courts of Common Law to deal with questions arising under the canon and civil laws. But there was no difficulty of principle whatever. As Lord Coke says, the ecclesiastical laws were "the King's Ecclesiastical Laws of England;" and if they are the king's laws, we are utterly at a loss to understand what objection on principle there could possibly be to their being adminstered by the king's judges. In so far as probate and divorce cases are concerned this has been actually effected in our day; and it is perfectly competent for the legislature, in entire consistency with the principle on which the Church of England is based, to transfer the whole jurisdiction of the Ecclesiastical Courts to courts of Her Majesty with a special jurisdiction, like the Probate and Divorce Courts, or to the ordinary Common Law Courts. We are not now arguing in

* Much valuable historical information on the Constitution of the Church of England, and many important views on the subject of a National Church will be found in "The Four Experiments in Church and State, and the Conflicts of Churches," by Lord Robert Montagu, M.P. In preparing the present article for the press, the writer had not the advantage of having seen this work, but having since had an opportunity of perusing it, he has much pleasure in referring to it as supporting the same views which are expressed in this article as to the political and legal relations of the Church of England, and as deserving the attention of all who wish really to understand the Ecclesiastical questions which have recently been agitated. It is proper however to add that there are some opinions expressed in the work with which the writer of this article is unable to agree.

favour of the expediency of such a course, but are only using this as an argument to show how unwarrantable is the assumption on the part of certain of the clergy that they have a claim of some nature or other to have cases of heresy tried by a spiritual tribunal. There is clearly no claim as a matter of right, and as to any claim on the ground that such a tribunal would be more competent to deal with cases of this nature, we entirely differ from any such notion. We are quite certain that no such claim will ever be recognised by Parliament. And after the recent discussion in the Upper House of Convocation on the subject, we do not see how the clergy, consistently with their own pretensions and assumptions, can ask the legislature for greater authority to be given to the bishops in ecclesiastical appeals.

Since the above remarks were written, the judgment of the Judicial Committee of the Privy Council has been given in the case of *The Bishop of Natal* v. *The Bishop of Cape Town.* The doctrines there laid down entirely support the views we have stated, and, in fact, we never for a moment supposed it would be otherwise. The only point on which any doubt could be entertained was as to whether the Bishop of Cape Town, although he had no jurisdiction by law, did not obtain it by contract or submission on the part of the Bishop of Natal. The court considered, rightly, we think, that there was no evidence of any such contract; and that even if there had been it was not competent to the Bishop of Natal to give, or to the Bishop of Cape Town to accept or exercise, any such jurisdiction. It is quite obvious to our minds that whatever contract might be implied from what took place was entered into by both parties under a complete mistake as to the subject-matter of the contract, and was therefore binding on neither. It was in fact a contract with regard to a non-existent subject-matter, which could have no validity whatever. But the court goes further than this, for it holds that even if both parties had been aware that the Bishop of Cape Town had no jurisdiction or legal authority as metropolitan, and the

appellant had agreed to give it to him by voluntary submission, it was not legally competent for him to do so. This of course refers to coercive jurisdiction—it does not mean, as seems to have been supposed in some quarters, that such a contract, supposing there had been no question of letters patent at all, would have been invalid. Such a contract would not have given a coercive jurisdiction to the Bishop of Cape Town, but would have been binding on the appellant, according to the principle laid down in *Long* v. *The Bishop of Cape Town*, to the following effect: "Where a religious body has constituted a tribunal to determine whether the rules of the association have been violated or not, the decision of such tribunal will be binding when it has acted within the scope of its authority; has observed such forms as the rules require, if any form be prescribed; and if not, has proceeded in a manner consonant with the principles of justice. In such cases, the tribunals so constituted are not in any sense courts; they derive no authority from the Crown; they have no power of their own to enforce their sentences; they must apply for that purpose to the courts established by law; and such courts will give effect to their decisions, as they give effect to the decisions of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties." This, we take it, is the legal position of the bishops of the Episcopal Church of Scotland and of the Episcopal Church of the United States of America, with respect to their clergy; and it would be competent no doubt to set up a similar church in any of our colonies, if it were thought desirable to do so. It is quite clear, however, that any church so constituted would be on an entirely different basis from the Church of England. It would be a mere voluntary association; it would have no coercive jurisdiction; it would have no pretension to anything of a national character, and would be only a sectarian and exclusive institution. We have no disposition, however, to enter at present on the subject of the colonial churches. But there are some points connected with the Church of England which

the recent judgment of the judicial committee involves on which we are anxious to say a few words.

The judgment, it is obvious, proceeds on the fundamental principle that the Queen is head of the Church in the same sense in which she is head of the State, aud that her authority is limited by the legislature as much in one case as in the other. Her authority in both cases arises from her representing the nation; and in each there are restrictions imposed upon her by the law, which is the "collected will" of the nation. It is absurd therefore for any one to affect to acknowledge the Queen's authority in ecclesiastical matters, but to repudiate that of Parliament. All the authority which the Queen possesses in ecclesiastical matters is derived from Parliament. And if there be any mysterious power inherent in the Sovereign as head of the Church, which is independent of Parliament, we can only say that the law does not recognise it, and that it is of no effect in the actual government of the Church. In one sense the recent judgment may be said to uphold the supremacy of the Crown, but it upholds it only as acknowledged, denfied and limited by the law of this country—in any other sense it treats it as a mere nullity.

The other fundamental principle on which the recent judgment proceeds is that the Church of England is a mere local institution, and is only co-extensive with the territory of England. It was said by Macaulay for another purpose, that the Church of England was as much a purely local institution as the Court of Common Pleas; and this is true in the strictest legal sense. The system of Church government and religious doctrine which prevails in the Church of England is that which the people of this country have adopted; but the moment you cross the Tweed—or when you have landed at Cape Town——the jurisdiction of the Church has no existence. Whatever religious body, adopting the government and discipline which are established by law in England, may exist out of the territory of England, exists by a different authority from that which makes the Church of England what it is; and

every independent colonial legislature, though subject to the Crown, is free to receive or to reject the Church as constituted in this country according as such legislature shall think fit.

There are some other points on which the recent judgment has thrown light, which circumstances now prevent us from noting. There is one, however, which arises in the form of a *quære*, to which we would call attention, viz.: Whether a metropolitan in England can deprive a suffragan? The case of *Lucy* v. *The Bishop of St. David's* is in favour of the right, but that cannot be considered as of an entirely satisfactory character. The point was raised on the argument in the recent case, but from the ground taken by the Court it became unnecessary to decide it. The general tenor of the judgment, as well as particular expressions, are, we think, against the supposed right.

In the observations we have made on the legal position of the Church of England, we have abstained from referring to that anomalous body—the United Church of England and Ireland. Whatever claim the Church of England may rightfully put forth to be considered as a national Church, it is impossible to rate the Church of Ireland as higher than a mere State Church; or to regard the union between the two as anything different from those effected by the tyrant, who

"Mortua quin etiam jungebat corpora vivis."

Nor can it be said that the union of the kingdoms involved the necessity of any such union, as the case of the union with Scotland showed; and besides, the union was not between England and Ireland, but between Great Britain and Ireland. The union of the Irish Church with the English was, in truth, inconsistent with the principle on which the latter rests; and while to the Church of England it has been a source of weakness, it has communicated no real strength to the Church of Ireland. In no respect can it be considered that the united Church is a national Church with reference to England and

Ireland, in the same manner as the Church of England is with reference to England; and as to the Church of Ireland itself, we confess ourselves entirely at a loss to understand on what grounds of policy or of principle it can be maintained in its present position. Whether it is necessary for the maintenance of a national Church that a numerical majority of the inhabitants of a country should belong to it, or merely that it should be the largest among all the religious bodies in the community, may be a difficult question, but it is quite clear that it must, in some sense not illusory, represent the nation in its religious capacity; and when this is not the case, the ground for endowing a Church with the public property, and giving to it a legal existence as a Church, fails altogether. What the proper policy with respect to the Church of Ireland may be, is a matter which no doubt involves a variety of questions into the consideration of which we cannot now enter.

The principle which we have above stated is not without its application to the Church of England itself. The primary condition of its existence is its national character, and the moment that this fails, the very basis on which it rests begins to crumble away. The more, therefore, it extends itself amongst the population of this country, the more does it strengthen its foundations; but however worthy of all praise its attempts in this direction may be, there is always danger lest it should forget its high calling as a national Church, and under some pretence or other degenerate into sectarian exclusiveness, and should then find, when too late, that whilst it has alienated the educated classes, it has not gained the masses to its fold. The pretensions of sacerdotalism, and the rigidities of orthodoxy, are not the influences best calculated at the present day to maintain the position of the Church of England, far less to extend or strengthen it; and the great effort, therefore, of all those who are attached to the Church, ought to be to retain in it that liberal and comprehensive character which has always belonged to it, notwithstanding any temporary obscurations, and which can alone enable it to stand

secure in such an age as that in which we now live. This is the true policy of the Church of England, which cannot be rejected without danger, and which is binding upon it as a national institution.

Art. III.—A LEGAL TRIPTYCH.—PLUNKET, ELDON, AND ROMILLY.

IN many of the grand old Flemish churches, a triptych, or triply divided picture, occupies the place of honour. The threefold picture which we are about to consider contains no saintly portraiture, and embodies no traditional story. Yet the contrasted lives of three great lawyers and statesmen of the past generation may have a significance at a time when it is happily not unusual for men to recall to mind their obligations to a worthy and noble profession. If our triptych shadows forth modern lawyers, instead of ancient saints, it will at least avoid the domain of myth and legend, and be strictly limited to sober historical fact.

The first figure is that of Lord Plunket, Chancellor of Ireland. In his younger days an ornament of that Irish Parliament which was extinguished by the legislative union. Afterwards the worthy compeer in debate of Canning and of Brougham. In his old age head of the law in Ireland, and a peer of the realm.

The central compartment of our triptych is allotted to John Earl of Eldon, for a quarter of a century the most trusted friend and minister of two Kings of England. A man who, owing to a singular combination of circumstances, occupied the highest seat of justice for a longer space of time, and enjoyed a larger share of political influence, than had before fallen, or is likely again to fall, to the lot of any lawyer.

Thirdly, there is Sir Samuel Romilly, a cotemporary of the others, but who, unlike them, was not ennobled by the Crown. Had he swerved from that independent course which he

deliberately chose, had he preferred the "applause of senates" to the approval of conscience, he, too, might have founded a peerage. But his name is well remembered; and is especially familiar to all who have studied those social and legal problems which demanded solution during the earlier years of this century. Our three portraits are of men who flourished then; who dignified the law by their conspicuous talents and unsullied fame; who rose from the crowd to high reputation. But the parallel ends here. They differed widely in some points, which will the more clearly appear as we place the figures in juxta-position.

I.

The north of Ireland, which yet maintains its old renown by sending Sir Hugh Cairns and Mr. Whiteside to the Legislature, claims the honour of Plunket's birth, in 1764. In the quiet town of Enniskillen, his father was for a time the presbyterian minister. Except during assize week, one may walk down the single long street without meeting any but the rural inhabitants of what, in comparison with many county towns, appears to be but a large village. The dimensions and aspect of Enniskillen scarcely accord with its place in history. It is, in truth, a notable place, capital of a rich and flourishing county, and gives its name to two regiments of the Queen's army. After inspecting the castellated enclosure, now used as a barrack, of which little is ancient except the water-gate, the visitor proceeds towards a lofty-steepled church, in whose chancel hang as trophies, several old banners of regiments. Near this is pointed out the modest comfortable house where was born to the Rev. Mr. Plunket a son who was destined to become famous. Whether the ceremonials of assize first induced the young Plunket to make choice of the law as a profession, we cannot say; but somewhere prior to the year 1790, he went up to Dublin, without fortune and probably without friends. From the same place, and nearly at the same time, went forth another youth, equally studious and

equally self-reliant, afterwards known as Archbishop Magee. These townsmen and early companions struggled upwards with good effect; and in due time occupied contiguous mansions, one as head of the Law, and the other as head of the Church, in Ireland.

Seventy years ago the profession of the law was a very promising one, for the number of those who adopted it was small; and while there was employment for all, any remarkable degree of ability was immediately recognised, and led its possessor to fortune by rapid steps. Plunket, moreover, lived at a time when there were many small boroughs returning members to Parliament, the proprietors of which made efforts to discover and promote rising men of talent. This practice partly redeemed from odium the system of nomination-boroughs, and atoned, in some degree, for the shameless trafficking in seats which prevailed with the less scrupulous and patriotic of the borough-owners. Plunket had scarcely taken the seat in Parliament which he owed to the favour of the Earl of Charlemont, when a momentous and all absorbing topic arose—the proposed Union. In these days of political quietude it is difficult to realise the state of the public mind at that time. A national crisis had arisen; and the Government on the one hand, and the Irish nationalists on the other, spared no efforts to procure votes in the legislature, and to press into the battle-field men likely to influence the result. Plunket at once joined the ranks which stood opposed to the Government. The popular dislike to the proposed Union extended to the ministers by whom that measure was recommended. Strong denunciations and bitter taunts were unsparingly hurled against Lord Castlereagh. In this strife Plunket uttered many things which his maturer judgment disapproved; and indulged in personalities which even the heat of that fierce conflict could not excuse. The fierce invectives and biting sarcasms of the orator were quickly re-echoed throughout the country, and were applauded by thousands of excited nationalists. These unsparing invectives contributed not a little to

the unpopularity of Castlereagh during the remainder of his life. After his death his friends erected in Westminster Abbey a statue to his memory; and on its base may be seen engraven these unfortunately chosen, because very ambiguous, words—"Ireland *will not soon forget* the Statesman of her Union."

But Plunket, within a few years, saw the wealth, the prosperity, and the civilisation of his country rapidly increasing, in spite of—we may even say in consequence of—that Union from which he had predicted only degradation and ruin. He was unsuccessful in his first great struggle, but he quitted it with honour, having become widely known to and admired by his countrymen. He soon became the acknowledged leader in the courts of law, for which he now for some years exchanged the scenes of political strife. The prosperous advocate soon forgot those vows which he had made in his own name and on behalf of his children—vows of eternal enmity against the British Crown; and he became as willing as his compeers to share in the honours and advantages which await a successful practitioner. He was largely employed in prosecuting the nationalists, whose rash attempts at insurrection kept the country in constant disquietude. Plunket has been censured for not remaining passive, while those were brought to trial who had shared his opinions, but had not, like him, loyally acquiesced in the decision of Parliament on the question of the Union. On the other hand, it has been urged that he did right to demonstrate his own loyalty, to disavow sympathy with treasonable enterprises. In truth, Plunket behaved like a clear-sighted, ambitious man of the world, free from any refined or chivalrous notions, mainly intent on self-advancement. There is no proof that he violated any promise, or betrayed any associate. It does not appear that there had ever existed any friendship or even community of feeling between himself and the unfortunate men whom he appeared to prosecute. No parallel can therefore be fairly traced between his conduct on Robert Emmett's trial and that of

Francis Bacon in the case of the Earl of Essex. Thenceforward Plunket's career continued to be marked by uniform and distinguished success. Those who remember seeing him at the Bar (and they are now but few) describe his powers as having been of the highest order, and say that his printed speeches convey but an inadequate idea of his oratorical gifts. His characteristics were animation and satirical pungency, combined with a style distinguished for clearness and logical precision. He possessed a gift rarely found among lawyers, a rich fancy; but it was strictly subordinated to the reasoning faculty. With these gifts it may be believed that none of his contemporaries, although more deeply versed in the science of law, were able to cope with him in the halls of justice.

After a long interval Plunket entered the Imperial Parliament. Great as were the expectations formed of him, they were not disappointed. He at once took a place among the masters of Parliamentary oratory; but unlike most of them, he addressed the House but seldom; reserving himself for great occasions. The question with which his name must ever be most closely identified, was that of Catholic Emancipation. His arguments were based less upon abstract right and justice, than on considerations of wisdom and expediency. He urged that it was prudent to remove a cause of lasting hostility and irritation. To the success of this great movement Plunket's oratory largely contributed. In course of time, being weary of the "cold shade of opposition," he accepted the office of Attorney-General for Ireland. That dignified office has two wholly differing aspects. Ordinarily the duties of its occupant are of a peaceful character, connected with projects of law, bills for regulating fisheries, prisons, courts of justice, and so forth. But in the days of the Third and Fourth Georges, the Attorney-General was constantly occupied in prosecuting persons for treasons, seditions, conspiracies, and other grave offences, real or imaginary. Plunket had a full share in these methods of promoting the public tranquillity. It seems to us almost ludicrous that some slight riot or drunken outbreak,

which a police magistrate would now dispose of in five minutes, should forty years ago have given rise to a State trial, at which the Attorney-General, in a speech of enormous length, solemnly invoked all the terrors of outraged law, closing with a peroration in which the deities are apostrophised in Ciceronian periods, and the well-being of posterity is committed into the hands of a bewildered jury, in phrases of sonorous magniloquence.

In 1828 great changes occurred. The long rule of conservative mediocrities, under the virtual leadership of old Lord Eldon, came to an end. Canning is placed at the head of affairs, and the claims of Plunket are such that he reaches at once the Bench and the Peerage. Two years later, still greater changes follow, and the very foundations are broken up. A new king; a new policy; a new order of political men and doings. But Plunket, though promoted to the Chancellorship of Ireland, has virtually finished his political career. The natural force of the orator has subsided. In the House of Lords his voice is seldom heard; and it is no longer a voice to threaten and command. The stranger can hardly believe that the old man before him could, in former years, enchain a senate with his eloquence, awakening out of doors among millions who detested the Union, a final outcry of protest and defiance. The period when repose is of all states most congenial, comes earlier to some men than to others. With the wonderful examples of Lords Brougham and Palmerston before us, we are apt to forget that these are exceptional and extraordinary instances. When Plunket became Chancellor, he was disinclined to make fresh exertions, or to achieve new victories, content with the discharge of a moderate amount of ordinary duty in the ordinary way. Like some other chancellors, he was keenly alive to the opportunities in his way of providing for his own family; and beyond this, there is little to be recorded of him in old age.*

* It is said that in the year 1828 Plunket was offered the Mastership of the Rolls in England, and that thereupon a strong opposition to the proposed

Plunket retired from the contention of Parliaments and Courts, to the seclusion of "Old Connaught," a picturesque retreat among the shaded slopes of the hills, some twelve miles south of Dublin, commanding fine views of sea and mountain scenery. Here he died but a few years since, surrounded by a generation which knew him not, and hardly remembered that the old man was among them, whose name had already taken rank among the Grattans and Castlereaghs of half-a-century since. Literature contains no memorial of Plunket; nor does his figure stand among those effigies in bronze which astonish visitors in their way through the streets of Dublin. But under the central dome of that great Palace of Justice which sets a worthy example of the concentration of courts—in the centre of the "Four Courts," there has lately been placed a marble statue of the orator, in a parliamentary, not a forensic, dress and attitude, erected by the Bar of Ireland in honour of him who was its brightest ornament. Is this statue his only memorial? We fear it is. His abilities were of the first order; and his opportunities were many: but we cannot recall any improvement in the law which can be ascribed to his exertions. The glory of having aided "Catholic Emancipation," he shared with many others. Nor do we find that he put forth exertions or made sacrifices on behalf of the thousands who suffered in his time from innumerable unjust laws and usages now happily at an end.

appointment arose on the part of the Bar, which prevailed. We have inquired into this story, and cannot find that there is the slightest foundation for it; still, it is worthy of remark, that it is believed in Ireland with an amount of faith rarely denied to any anecdote which does not tend to promote international good feeling. Again, it is said that Plunket was treated with ingratitude and discourtesy, when the late Lord Campbell was appointed to the Irish Chancellorship in his place. It is undoubtedly true that some three or four weeks before the inevitable change of Government in 1841, Lord Campbell was appointed; but this was a party exigency, not to be construed as a slight to Lord Plunket, whose tenure of office was only shortened for the purpose of securing a retiring pension for his immediate successor. The transaction may be indefensible on public grounds; but as between the chief persons concerned, it was merely a shrewd device for giving large retiring pensions to two ex-chancellors instead of one.

II.

We now turn to the principal figure in the group—John Earl of Eldon. His astute and dignified aspect, his handsomely moulded features, have become by means of portraiture familiar to all. Of humble origin, he became the confidential friend of kings, and the chosen leader of the proud peerage of England. For thirty years he influenced the destiny of this empire, directing the course of legislation, and impressing his own mind on the details of home-government. We have abundant information as to his history from different sources, for his life has been carefully written by a political enemy, as well as by a political friend. Lord Eldon had that true nobility of mind which made him throughout life proud of being a freeman, and the son of a worthy freeman, of Newcastle. In 1751, that busy town must have worn another aspect to that it wears now; for coal miners had scarcely begun to dig out the rich spoils of the earth, and the flowing Tyne was not then laden with a thousand dusky coal ships. Probably, the only ones remaining of the old landmarks, are the Cyclopean tower, from which the town derived its name, and the graceful flying buttresses of the church of St. Nicholas, hard by. No Eldonian shade protects even the old lawyer's birthplace from the hand of innovation; new streets and bridges are all around, and conspicuously the gigantic iron bridge of Stephenson. The events of Scott's early life; his clandestine marriage; his life at Oxford; his early years of residence in Cursitor Street, and practice at Westminster; his sudden rise, his swift progress to the highest places in the law; are they not all written in the biographies of Twiss and Campbell? The biographers have told us much; but they have failed to explain one most important feature of Scott's character. He had an acute, as well as a well informed and well balanced mind, but it was remarkable for a great defect. He united a powerful understanding with a morbid dislike to change of any kind. He persistently hated, and vigorously opposed, improvement in any shape. It were curious to trace the formation of his opinions,

and to discover the origin of this singular defect, did any materials exist for the inquiry. The incidents of early life and training, rarely affect to any great degree the growth of vigorous minds like his. Such minds are little apt to be warped and moulded by external influences, but rather break away untrammelled, and find new paths of their own. It would be a very inadequate explanation, to refer Eldon's obstructive habits of mind to his Oxford training. Of all centres of intelligence, Oxford is remarkable for not repressing mental activity. From thence arose Methodism in 1730. From thence arose Anglicanism in 1833. From thence is now arising a newer development of religious thought. Whether in a right or a wrong direction, there is a constant activity. It were a superficial and an erroneous view, to conclude that those old grey towers and quiet cloistered quadrangles bespeak an atmosphere of intellectual stagnation. Moreover, Scott was destitute of imagination, and could hardly have been affected by the memories of that learned old city, as many a student has been in his dreamier moments. Still remains the fact, that with his rigid and consistent Toryism, he proceeded into active life from out of the most ancient college of our most ancient university; a coincidence, if nothing more.

Mr. Attorney-General Scott, for he so became so early as 1793, was the special favourite of King George III. That he should have become so is not surprising, when we reflect on the mental resemblance between them, making every allowance for the superior intelligence of the favoured lawyer. He rose into court favour more by the identity of his opinions with those of the sovereign, and by the courtliness of his manners, than by any brilliant figure which he had made in the House of Commons. His political oratory appears indeed to have been of a mediocre character; and when he attempted to break a lance with Sheridan and other masters of Parliamentary fence, his failure was conspicuous. In this respect he contrasts strongly with Plunket, whose reputation was

made, and whose ascendancy was secured, through his eloquence. He, however, resembled his more brilliant Irish cotemporary in the energy with which he carried out the wishes of the Government, with regard to the prosecution of political offenders. His speeches on these occasions appear to have been destitute of any interest, and to have made up in length what they wanted in force. He received promotion rapidly, and after a short experience as Chief Justice, he received the Great Seal from his sovereign, who accompanied the gift with unusual expressions of regard. When the news reached Newcastle, bells were rung in honour of the freeman who had received those distinctions, and flags were hoisted on the coal ships of the Tyne. Eldon's career as a statesman now began. The time was a critical and anxious one, for public affairs at home and abroad were unsettled, and the King's state of health excited apprehension. The Chancellor's determination of purpose in conducting affairs of State, and especially in procuring the royal assent when the other ministers feared even to ask for it, is well known to have been very remarkable. Two of his successors in his high office have criticised this part of his career. Lord Brougham wrote as follows:—

"He who would adjourn a private estate Bill for weeks, unable to make up his mind on one of its clauses, or would take a month to decide on what terms some amendment should be allowed in a suit, could, without one moment's hesitation, resolve to give the King's consent to the making of laws, when His Majesty was in such a state of mental disease that the keeper of his person could not be suffered to quit the royal closet for an instant, while his patient was with the keeper of his conscience, performing the highest function of sovereignty."

Lord Campbell states, that when the King was so ill that no other cabinet minister had nerve sufficient to transact business with him, Eldon actually induced him to dismiss Mr. Addington, and to recal Mr. Pitt as Prime Minister; and

the same authority proceeds, perhaps justifiably, to characterise Lord Eldon as a "consummate master of political intrigue!" He acquired an ascendancy among the peers no less remarkable; and among other wise and beneficent projects which he induced them to reject, was one for abolishing the atrocious traffic in slaves. When the change of Government occurred in 1806, Eldon retired from office for a brief interval, which he occupied in taking up the cause of the Princess of Wales; but that cause he afterwards abandoned in deference to the wish of the Prince, whom he dared not to offend. In 1807 the Whigs retreated from the management of affairs, Plunket and Romilly being among those who ceased to hold office under the Crown. Eldon joyfully resumed his seat on the woolsack, and remained for more than twenty years a ruling spirit in the administration. A letter written by him at this juncture, has been much commented on, as showing that an acute and judicial mind could nevertheless attempt to deceive itself, by pretending a preference for a retired life, and freedom from ambition. Lord Campbell (writing with some political acerbity) accuses the old Chancellor of "hypocrisy;" and even a more friendly critic, Mr. Surtees, does not hesitate to call this "canting;" yet it may be doubted whether equally grave offences may not be laid to the charge of most other Ministers of State, past and present. The history of Eldon's ascendancy is well known. It was the prolonged triumph of the obstructive policy. But it came to an end, and a hundred improvements were then wrought with a rapidity which showed the need that existed for them. The Eldonian mode of government perished, and the Eldonian maxims fell into contempt. The old Chancellor, during the remainder of his life, had no pleasure in watching the progress of events around him, and he took refuge in a quiet home circle, to whom he narrated anecdotes which have proved invaluable to the biographers. Here he indited notes to his relatives, and observed the peculiarities of his dog Pincher. Two happy days stand out brightly from the records of his later years.

One of them was spent at Oxford, where he was entertained at his old college with fitting reverence and almost royal distinction. The other in the Hall of the Middle Temple, surrounded by a learned throng, among whom his great judicial name had become as a household word. In that noble building a finely chiselled likeness of the old Chancellor now occupies a place of honour, the whiteness of the marble contrasting with a dark background of Elizabethan oak. The insignia of a hundred great men are blazoned around; but among them is scarcely a greater name than that of John, Earl of Eldon.

His services to his age being considered, we find them capable of being summed up in this, that he was pre-eminent in the administration of equity, and a faithful servant of the Crown. His procrastinating habit was the only drawback to his high judicial fame, a fame which has suffered no diminution, and is not likely soon to be eclipsed. As Lord Hardwicke founded, Lord Eldon may be said to have consolidated and established, an equity jurisprudence of which English lawyers are justly proud. There may remain laurels to be gathered in the work of codification; but there is small chance that Lord Eldon's judicial fame will ever be surpassed, inelegantly as his judgments are expressed, and little as they deal with general principles. Apart from his judicial merits, we can find little in his public conduct to justify commendation. His views on most public questions were in the highest degree narrow and intolerant. He neglected rare opportunities of improving the statute law, and refused to allow of improvements when suggested by others. He is accountable for the continuance of a barbarous criminal code, when but for his obstructive influence it would have been modified. He is also accountable for many other public grievances of various kinds, which appear on every page of the cotemporary records. If Plunket was censurable for not discharging the debt which a man gifted by genius and favoured by fortune owes to his age, Eldon was doubly censurable for his wilful obstruction of the pathway of

improvement. He not only left evil and injustice unremedied, but he on all occasions scouted the projects and defeated the attempts of men like Romilly and Mackintosh to diminish the misery around them. Happily for our time, no statesman of the Eldon stamp will be tolerated. If there is a rivalry for place and power, there is a still keener rivalry as to who shall by wise reparation strengthen the fabric of the Constitution. If the great prizes of the law are still contended for, it is acknowledged as a duty incumbent on those who win them, to design and carry out measures for the improvement of the law in all its branches.

III.

The third figure is that of Sir Samuel Romilly, less widely known among non-professional readers, it may be, than his two cotemporaries, but not less deserving of honour. His fame is of a kind that depends not on the station which he filled, or the honour to which he attained, or the popularity which he enjoyed, in his lifetime. His name is reverenced less by the multitude, than by the comparatively small number of those who know what English law was sixty years since, and can compare it with English law of to-day.

Romilly's ancestors were driven out of France, being of the number of those whose religious faith exposed them to frequent persecution and constant annoyance. From his earliest years he was familiar with the language of the exiles, and he imbibed a love for foreign travel and for foreign literature which contributed largely to the formation and expansion of his mind. Hence we trace a singular freedom from narrow prejudices and bigotries like those which have been perceptible in some otherwise powerful minds. We may fairly conclude that Lord Eldon (for example) would have derived great advantage from some acquaintance with the literature and usages of other nations. This circumstance in Romilly's favour we consider one of much importance when his career is examined. Without neglecting the study to which he primarily devoted

himself, he acquired a familiarity with the best writings, both ancient and modern. By frequent comparison of the laws and customs of different States, he learned to prefer the world-wide principles of justice to those petty technicalities which at that time encumbered English law. The story of his early years, and of his rise to the first position at the Equity Bar, is to be found in the volumes edited by his sons. Let us add that a condensed edition of this work, which should point out the changes in English law first suggested by him, and afterwards carried out by other hands, would be a valuable addition to legal literature, and a fitting tribute to the memory of the first great law-reformer.

Looking back, in imagination, for fifty years, we may see in the sombre Court of Chancery the two greatest equity lawyers of the time daily engaged in different capacities. On the Bench sits the great Chancellor Eldon. Before him, conducting any case that may happen to be at hearing, is Romilly. Day after day, and year after year, they might be found similarly engaged. Each of them knew the mental qualities of the other, respected his conspicuous virtues, appreciated his professional learning. But, out of that Court, no two men could differ more widely in pursuits and modes of thought. "Wide as the poles asunder" on all public questions, there was ever that mutual esteem and unfailing courtesy which alone can render professional and political life tolerable to men of kindly and sensitive natures. In 1806, for a short interval, Romilly held office; and he lost no time in endeavouring to amend the Bankrupt Laws, and to render real estate liable for the debts of a deceased owner. From 1807 to 1818, the year of his death, Romilly was a leading member of the "opposition," active in proposing measures of law reform, the consistent enemy of slavery, and the uncompromising foe of intolerance and injustice in all shapes. It is evident that if the utility of a statesman's life is to be measured by his tenure of office, Romilly was answerable only for such opportunities as one short year afforded. But his career furnishes a bright

example of the good which may be done by a man who does not enjoy direct influence over public affairs. Romilly's thorough independence of character is well illustrated by the course which he adopted in the case of the Duke of York. In 1809, proceedings were taken against the Duke, at that time the heir presumptive to the throne. The King and the Prince of Wales both intimated that no peer or commoner could vote against the Duke without forfeiting their good will. Romilly was fully aware of the consequences of an adverse vote, and might easily have absented himself from a division. He felt, however, that his duty was to give a conscientious vote against the Duke, and he accordingly gave it. Sir James Mackintosh pronounced this action, "a sacrifice of the highest objects of ambition to the mere dictates of conscience." At the same time, Romilly refused to receive the adulation of the populace. To those who requested him to take part in a public demonstration, he replied as follows:—

"Upon whatever questions come before the House of Commons while I have a seat in it, I shall vote and speak as I think my duty and the good of the country require, without caring whom such conduct may please or may offend. But I have a very great objection to acting any conspicuous part, or putting myself forward in any way out of the House upon any public measures."

Here was an approach to the ideal standard of public virtue. What is more admirable than this grand indifference both to the frown of the Court, and to the applause of the multitude?

The list of amendments and ameliorations in our laws which Romilly either proposed, or earnestly supported, would be a very long one. A few only can be adverted to. He protested against the continuance of barbarous (sometimes fatal) punishments, then common in the army and navy. He recommended that the period of enlistment should be shortened. He pointed out the demoralising effects of the public lotteries. He made frequent attempts to check the harshness of the Criminal Laws, standing almost alone in his advocacy of a more

humane and discriminating scale of punishments. Year after year he introduced Bills with these objects in view; but Parliament was not to be moved until years had passed by, and then one by one his suggestions were adopted; and at length our laws became nearly all that he had wished them to be. The student of Romilly's life and letters will pronounce that his character was consistently pure, and his aims uniformly beneficent. That he was throughout his life engaged in the ordinary occupations of the law is a fact of itself almost sufficient to rescue the law from the imputation of fostering in her sons the more selfish and ignoble qualities. Romilly's career came suddenly and lamentably to a close in 1818. He left to his sons a name in itself more honourable than a peerage. It will be associated in all time with those of Howard and of Wilberforce, enrolled among the scanty list of those who have devoted themselves, heartily, effectually, disinterestedly, to the public good.

Thus have we ventured to sketch, in rough and inadequate outline, these three great lawyers who flourished in eventful years not long gone by. From the contrast so presented, the reader will draw his own moral. Probably he will assent to this conclusion; that the "debt which every man owes to his profession," was more fully satisfied by him, whose opportunities of paying it were the fewest. In our view, the large-hearted Chancery barrister deserved better of his country, and left behind him a nobler reputation, than either the great Parliamentary orator, or the oracular Lord Chancellor.

R. D. U.

Art. IV.—THE LAW OF MARRIAGE AND DIVORCE IN AMERICA AND ENGLAND.

Commentaries on the Law of Marriage and Divorce, &c. By Joel Prentiss Bishop; 2 Vols. Boston: Little, Brown, & Co. 1864.

In a recent number we directed attention to that portion of this work which treats on the subject of marriage; we

now devote a few pages to the remaining subject of divorce. A special tribunal for the purpose of dissolving marriages has at length, after a severe struggle and through much obloquy, been established in England; this will enable us to show in what light divorce is regarded here, and Mr. Bishop's volumes inform us how it is dealt with in America. We will take the latter first. It is obvious that at the very threshold of an inquiry into this matter we must encounter the question, and be prepared to answer it—Is marriage to be dissolved for any cause whatever? This has ever been the obstacle in the path of legislation, and to this day a wide difference of opinion exists and ever must exist, especially in Roman Catholic countries, which hold marriage to be one of the sacraments of their Church. So much has been written on this subject that it would be but a vain repetition to dilate upon it. Mr. Bishop, in the second chapter of his first volume, gives a brief historical sketch, from which he arrives at the conclusion, now pretty generally received, that,—

"The doctrine of indissolubility of marriage was engrafted on the law, not by the wise men who at any time swayed the civil affairs of Rome, but by the Roman Church as a religious tenet. The doctrine is believed to have been first made a general tenet of the Church by the Council of Trent, in the year 1653. It was never accepted by the Greek or Eastern Church."

But as, up to the Reformation, the religion of Rome was the religion of this country, marriage was deemed indissoluble; and although, as our author reminds us, an attempt was made by the commissioners appointed under 25 Hen. VIII. c. 19, to examine, among other things, the canons, constitutions, and ordinances, so as to render them consistent with the transfer of the supremacy of the Church of England from the Pope to the Sovereign, and to compile therefrom a "Reformatio Legum Ecclesiastiarum," whereby, among other provisions, marriage under certain circumstances might be dissolved, and the divorced parties might marry again, still, as these *leges ecclesiasticæ* never became the law of the land, the matrimonial status

remained as before—in short, indissoluble; and since the matrimonial law of England is part of the common law of America, marriage is *primâ facie* indissoluble, and can only be set aside by legislative enactment, setting forth what breaches of the matrimonial engagement are sufficient to free its parties from it; and on this point Mr. Bishop says (p. 31, Vol. I.),

"The legislation of the States has been quite various, but in most of them judicial divorces from the bond of matrimony are permitted for adultery, and in many of them for a considerable number of other causes."

It appears, however, that South Carolina is a solitary exception. It has never for any cause granted a divorce, either legislative or judicial; and he adds, in the next section:

"The tenets of a sect, whether it be the Roman Catholic, the English Church, or any church of dissenters, cannot properly be put forward to govern the legislative question of divorce in any of our States."

We recommend this remark to the consideration of those who impugn our Divorce Act, and would repeal it if they had the power; but on this we shall have to say a few words hereafter. Having arrived at the fact that the *vinculum* of marriage may be abrogated in the American States, we proceed to inquire into the process necessary to effect that object. America having no nationally established religion, does not possess tribunals similar to our Ecclesiastical Courts; and as that nation has not yet created a special court for the trial of divorce and matrimonial causes, these questions are left to the ordinary tribunals of the country. From Mr. Bishop's statement, this does not appear to produce a very satisfactory result, inasmuch as great uncertainty prevails, not only as to the proper court in which a suit is to be entertained, but also as to the mode of procedure, a blemish on the escutcheon of justice, we need scarcely add, of a very serious nature. He says (p. 254, Vol. II.),

"In some of our States the suit for divorce is to be brought

before a court of common law; in others, before a court of equity; in others, before a court which has both equity and common law jurisdiction; and in all, the suit is more or less modified as to the procedure by the peculiar nature of the subject, and by the adoption of rules from the Ecclesiastical Courts of England. The result, therefore, must be, and it is, that in none of our States is the procedure very well defined, while it somewhat differs, so far as it is defined, in the different States."

In our former notice of Mr. Bishop's volumes, we took occasion to remark on the conflict produced by the adoption by the different American States of different laws. Here, again, is an example of the confusion and uncertainty to be caused by the want of one uniform system of legislation. As to the grounds of dissolution of marriage, according to the policy pursued in the greater part of the States; they are, adultery, desertion, extreme cruelty, perpetual, perhaps temporary imprisonment, and drunkenness, when it is confirmed.

"Beyond this," says our author, "We come to ground uncertain and shadowy; there are smothered hatreds, love turned to the reverse, jealousies, which no reason can allay, an undefined jarring of natures coming into collision, and other purely mental causes, which render the marriage burdensome and destroy its higher and holier purposes. But these are of a subtle nature, and human tribunals cannot deal with them well."

We would ask, can they do so at all? The subsequent language would lead us to infer that the American tribunals do attempt to deal with these intricate questions, but it must be admitted this conclusion is not free from doubt.

That this difficulty is felt by Mr. Bishop himself, is proved by his own language. After stating that the courts and legislatures of America have not taken uniform views on the subject, he proceeds (p. 827, Vol. I.):—

"An attempt has been made in some of our States to supply the defect; the method adopted is the following. The statutes, after enumerating the allowed causes of divorce, add in a separate

clause, that, *The Court may grant the divorce in all other cases in which the same seems just or beneficial to the public;* and so on, *the words being different in different States.*"

He then cites as an example a proviso in the Statute of Maine, as revised in 1857:—

"That a divorce from the bonds of matrimony may be granted by any justice of the Supreme Judicial Court, when in the exercise of a sound discretion he deems it reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society."

In deprecation of such a latitude of jurisdiction as this, he quotes with approbation the words of Chancellor Kent. "The vast power and discretion given by these statutes must prove exceedingly embarrassing and painful in the exercise," and we would add, extremely prejudicial to the moral interests of society, as encouraging speculative attempts to obtain freedom from the bond of marriage, calculated to foment discord, and also destructive of uniformity and certainty, which ought to be the basis of justice. It is satisfactory to find that the remedy suggested by Mr. Bishop for these evils is in accordance with our own new law.

"Let the statutes," he says, "enumerate such specific causes of divorce as are thought to be expedient to be enumerated. Let the enumeration cover the whole ground of what is deemed to be universally expedient as applied under the restrictions indicated by our unwritten law on this subject to all cases between all parties."

If we substitute "the general views and feelings of society" for "unwritten law," our Divorce Act has been framed on these principles. We have specifically set forth what shall be sufficient grounds for divorce and judicial separation, and we have widened their scope in some measure, so as to include causes of matrimonial disruption of which our law formerly took no notice, but we go no further. We do not, as Mr. Bishop would advise, empower the Divorce Court to dissolve a marriage, or even pronounce a judicial separation when a case

falls within the spirit, although not within the terms of our law; nor do we instruct the judge to grant a divorce or a separation whenever he deems the case to be within the reason of the law, within the general mischief the law is intended to remedy; but the duties and the powers of the court are confined, as we technically say, to the four corners of the Act of Parliament which has constituted the tribunal and defined its jurisdiction. From our author's silence on the subject, there being no mention of a jury in these volumes with reference to divorce, we presume their intervention is never invoked, but that questions of fact are left to the discretion of the judge alone, as was our own practice in the Ecclesiastical Court; and thus the judge's decision may be guided more by equitable than strictly legal principles; not that it is to be inferred therefrom that the judges of the Ecclesiastical Courts were prompted thereby; their decisions were *secundum allegata et probata.* And here we must add that in trials in our Divorce Court, the aid of a jury may be invoked, but it rests not with the judge or the rule of the court, but with the suitors themselves.

A very strong, and, as we consider, a very just remonstrance, is made against divorce *a mensa et toro* (or, as we now term it), "judicial separations" and proceedings for "restitution of conjugal rights." An able jurist,* in our own country, and in our own day, denounces the former as "a sort of insult rather than satisfaction, to any man of ordinary feelings and understanding." It has, however, been retained by us in the remoulding of our marriage law, clothed, it is true, with some important incidents, as for example, placing the separated wife in the position of a *feme sole;* still, it leaves the separated persons, in the language of Lord Stowell, "in the undefined and dangerous characters of a wife without a husband, and a husband without a wife." The law professes to entertain the possibility of the parties returning to cohabitation, and therefore leaves them still husband and wife in name; but in fact they are wholly

* Mr. Macqueen in his Treatise on Husband and Wife, p. 167.

estranged from each other, and their return to cohabitation is a very remote, if not altogether a visionary contingency. But the real purpose of these separations was to evade the dissolution of the marriage tie. If a wife or husband could show that the vow of fidelity had been violated, or that cohabitation was unsafe by reason of the violence and cruelty of the one or the other, a separation was decreed from bed and board, whereby they were no longer bound to live together; but the *vinculum matrimonii* still remained; it was too sacred to be touched; such was the doctrine of these tribunals, under whose special jurisdiction causes matrimonial remained, until the passing of our Divorce Act, and thus it was only by a special Act passed for the purpose that any marriage could be dissolved. From the reluctance to dissolve marriage, for any other cause than adultery, it was necessary to allow separation where the duty of cohabitation ought no longer to be enforced. Our author is more severe in his language against the suit for "restitution of conjugal rights," and he seems to exult when he tells us that that suit has never been adopted in any of the American States. It certainly does appear a strange paradox, to compel a person to cohabit with one towards whom he or she has so strong a repugnance as to have induced a voluntary but determined separation; and now, since the English Divorce Act makes desertion for two years and upwards a ground for a judicial separation, when, if granted, a provision will be made for the wife out of the husband's income by the name of permanent alimony, the necessity for this procedure no longer exists; assuming as we do that the real object of the suit is not to regain the society of a reluctant husband or wife, but is generally prompted by a mercenary or vindictive spirit. Again, there is an evil resulting from this mode of procedure; a husband illtreats his wife, she leaves him and refuses to return. She does not sue for a separation on the ground of his cruelty, waiting for him to sue for a restitution of conjugal rights, when she will plead his cruelty in bar. If she esta-

blishes his cruelty, his petition for a decree to compel her to return to cohabitation is dismissed, and they remain in the same position as before. Although the wife may prove the cruelty of the husband, she will not be entitled to a judicial separation; in order to obtain that she must proceed by another and separate procedure; the Divorce Court cannot engraft any other result on any procedure than that which the petitioner seeks, and the present judge of the Court has more than once expressed his regret that, fettered by the words of the Divorce Act, he is unable to do so. In the Ecclesiastical Court it was frequently done; if the defence to a suit was established, thereby criminating the plaintiff, a decree was given in favour of the defendant, thereby changing the defence into the nature of a plaint. We have hitherto been considering judicial as distinguished from legislative divorces. Mr. Bishop writes:—

"From England was imported into most of our States, the practice which prevailed more in earlier times than now, of granting legislative divorces in meritorious cases, not reached by the general law; these special divorces are usually from the bond of matrimony, from bed and board, and sometimes they are in the nature of a sentence of nullity; generally the English practice is adopted, of passing—though with less accompanying formality than in England—an Act operating directly on the marriage; but occasionally the method has been to empower one of the judicial tribunals to investigate the cause alleged, and grant the divorce if the complaint is sustained."

This, indeed, is the practice always resorted to in some of the States (it bears a strong analogy to the practice of our own Divorce Court). This language appears scarcely consistent with what Mr. Bishop describes as the practice at page 827, Vol. I. (stated at page 61 *ante.*) The explanation, however, is not difficult when we remember the want of harmony in legal procedure which prevails throughout the American States. We may here observe that our Divorce Act has abolished legislative divorces, as it was intended it

should, although it may be a question whether Parliament might not be invoked to set aside a marriage without the power of the court; for example, to annul a marriage which, though binding in law, was contracted under such circumstances as justified equitable relief, as in the case of Miss Turner, in 1827, and also that of Miss Tabor.

Although Mr. Bishop does not state it in broad terms, still we conclude that wives in the American States have the same power of seeking divorce as husbands, except that in some States they cannot proceed alone, but must do so by their next friend; so also in their defence; this may result from the equitable element which seems to pervade such inquiries. We have not gone so far as to place wives on quite the same footing as husbands; the question was much debated during the progress of the Divorce Act, and a sort of compromise was the result. For adultery alone the wife cannot obtain a dissolution of her marriage, whereas a husband can; she may, however, obtain a judicial separation. We must now leave Mr. Bishop's volumes, although we feel we have, as it were, but skimmed their surface. To all who would gain information on one of the most intimate and serious relations in life we sincerely recommend them to probe their depths.

We now turn our attention to the question of divorce as regards ourselves. Notwithstanding that the law of the land unequivocally declared marriage to be indissoluble, our legislature, at the instance of aggrieved husbands, passed Acts of Parliament dissolving their marriage, *to enable them to marry again.* The preamble of such Acts always contained these words; "Showing thereby that part of the relief sought was to enable the petitioner to supply an heir to his estate, if he had not one by his first marriage." The privilege, with three solitary exceptions, has never been conceded to wives. Acts have been passed* to nullify their marriage, as in the case of Miss Turner,

* In the year 1827.

abducted by Mr. Wakefield, but that is a different procedure from divorce. These Acts of Parliament were necessarily preceded by an action at common law and a suit in the Ecclesiastical Court, and could only be obtained at considerable cost, and were therefore practically confined to the wealthy.* At length, in the session of 1857, the "Act to amend the Law relating to Divorce and Matrimonial Causes in England" was passed, and on the 1st of January following it came into operation. It at once silenced the doctrine that marriage in England was indissoluble; it established a court whose doors are open to all, where the humblest in rank may seek redress on the same footing as the highest in the land; it enables a wife to free herself from constrained cohabitation with a brutal or unfaithful husband, and it enables a husband to free himself from the tie which binds him to a profligate or faithless wife; and it moreover enables parties whose marriage has been dissolved to marry again; but adhering to the doctrine that adultery alone should be the ground of dissolution of marriage, it was compelled to adopt the separation *a mensa et toro* of the Ecclesiastical Court, which it did under the name of "judicial separation." Had it not done so, no redress could have been given save where adultery had been committed.

Great was the dissatisfaction expressed, both by laity and

* We cannot here refrain from narrating what passed between a judge (now dead) and a prisoner charged with bigamy, although by so doing we may incur the charge of a *decies repetitsa*. The prisoner pleaded guilty, but urged in palliation of his offence, that his wife had left him shortly after their marriage, from no fault of his; that she took some of his property with her to go and live with another man, that she continued to live in open adultery; that he had therefore married another woman, and that they lived very happily together. The Judge replied, "You have violated the law by acting so precipitately. What you should have done was this. You should first have brought an action against the man for damages, that would have cost you £50 or £60; you should then have gone to the Ecclesiastical Court for a separation from your wife from bed and board, at a further cost of about the same sum. If you had succeeded in these, you should then have applied to Parliament for an Act to set aside your marriage; that would have cost you about £600, and then you might have married again with impunity." The man replied, "I have not £50 in the world." The judge rejoins, "I cannot help that. You have violated the law, and I must pass sentence upon you. You will be imprisoned one day and fined one shilling."

clergy, on the introducing into our legal and social economy the dissolubility of marriage; dire were the evils prognosticated; scandal and immorality were to abound, with a lengthened train of evils in their wake. Peers and Prelates in the one house, and Commoners in the other, denounced the change in the law. One member said,

"You may in your pride decree the dissolution of marriage; but woe to those who put confidence in your decision, and reject the universal testimony of Scripture, from the first chapter of Genesis to the last in Revelations."

These expressions were received with approbation by a portion of the House. The opposition, however, was useless. The feeling of the country was in favour of the change, and the Government sternly resolved that the measure substantially should pass. Let any one turn to the pages of Hansard, and he will not only find eloquence and learning bearing on the question, but he will also learn that our laws on important questions are not hastily or recklessly made; that opinions, however conflicting, are listened to and duly weighed; and that if conclusions are not arrived at by pure reason or sound judgment, every effort is directed to that end. One question which disturbed the conscience of the bishops, and which still continues to trouble the clergy, was the permitting the divorced adulterer or adulteress to marry again. There were two phases of the question; should they be prohibited from marrying at all, or should the prohibition be confined to marriage between the guilty parties? Opposition to the first was not long sustained, but the second was firmly opposed; on a division in the House of Lords, 24 peers, including 7 bishops and 1 archbishop, were in favour of the prohibition; but 46, including 1 bishop, were against it. We cannot quit this part of our subject without citing the words of the Lord Chancellor in urging the rejection of this prohibition, and we are the more inclined to do so from the steps recently taken in Convocation with reference to it.

"I consider it," said Lord Cramworth, "a most objectionable provision, because it inflicts a most cruel punishment on the woman, and I am afraid in nine cases out of ten it will be a great boon to the adulterer. I believe that in ordinary cases, a man who has committed adultery which has resulted in a divorce, would feel himself bound in honour to make all the reparation he can by marrying the woman whom he has excluded from society; and I am afraid that the consciousness that he cannot be compelled to do this will have a tendency to render him by no means less inclined to commit adultery; while on the other hand, this clause would relieve him from the great embarrassment of a kind of retributive justice by the law actually preventing him from making this reparation; I am, therefore, of opinion that the bill is much better without this clause."

He then alluded to the practice of introducing such a proviso in private Divorce Acts in the House of Lords, and its invariable rejection by the House of Commons, as showing the justice of acting in the same spirit in a general as in a private bill. Lord St. Leonards also forcibly illustrated the injustice and danger of prohibiting a man from marrying the woman he had ruined.

It would appear from the proceedings in Convocation in February last, that the clergy complained that the privilege of a second marriage created a grievance to their consciences; they were, it was said, placed in a very difficult and painful position; the law of the State had been brought into conflict with the law of the Church. They were bound to administer the latter, and bound to obey the former. The Church, they insisted, had never altered its law as to the indissolubility of marriage; the Church said a divorced woman should not be allowed to marry while her husband was alive, but the law of the State overrode all that. Although a proviso had been inserted in the Divorce Act, whereby no priest could be compelled to marry divorced persons, still the clergy might be called upon to administer the Sacrament to such persons. To this it was well replied, that before the late Act persons might be divorced by the Legisla-

ture, and the clergy had no escape from the obligation to perform a marriage ceremony between them if required; whereas now they were in a better position; and it was sensibly observed, that if the Canon Law came into collision with the law of the State, the former must give way.* With every respect for the clergy, we cannot but think this ought to satisfy their scruples. They have made their protest; they are not personally obliged to marry divorced persons. As to refusing them the Eucharist, we hope in the name of Christian charity that no Protestant minister would be guilty of such an act; the days of excommunication are passed. If he did so, how far he would be amenable to law we will not pretend to say. There is an old case in the books (*Clovell* v. *Cardinal*, 1 Siderfin's Rep., p. 34) in which an action on the case was brought against a clergyman for refusing to administer the Sacrament; it was not denied that the action would lie, but it was held that sufficient notice had not been given to the clergyman, by the would-be recipient, of his intention to present himself at the communion-table, and thus no decisive result ensued.

There was one point, however, on which Parliament had no difference of opinion—the abolition of crim. con. actions; but the difficulty was to still punish the offending paramour. It was proposed that a fine not exceeding £10,000 should be levied upon him, in addition to saddling him with the costs of the proceedings. Some members urged imprisonment in addition. The result, however, was that the offender was to be liable to the costs of the suit, and a claim for damages; but a further and a very objectionable means of punishing him, and solacing a husband for the loss of his wife was adopted, which enables a husband to petition the

* It was enunciated as an incontrovertible proposition long ago settled, that the Canon Law of Europe does not, and never did, as a body of laws, form part of the law of England. The rule, says Lord Hale, is, that the Canon Law is binding only so far as it stands uncorrected, either by contrary Acts of Parliament or the common law or custom of England. Chief Justice Tindal in *Reg.* v. *Nullis*, 10 Cl. & Fin. (H. of L. Rep.) p. 534.

court for damages without seeking for a dissolution of his marriage; the effect of which is, that although the guilt of the wife is proved, the husband may still continue to live with her; the damages awarded to him for his dishonour may be applied to the use of his wife and children (if he have any). It is true, the court has the power of settling the money, or any portion thereof, for the benefit of the children, or for the maintenance of the wife. This, however, is but a further step towards degradation; the children may be educated by the price of their mother's dishonour, and she herself may be maintained by the sale of her virtue.

We have stated that the clergy have declared themselves opposed to the establishment of the Divorce Court, as violating the sanctity of the marriage bond; but it must also be admitted that a portion of the laity, although for a different reason, have uttered similar sentiments—matrimonial infidelity is encouraged, the tone of morality is lowered. Of the truth of these assertions there can be no satisfactory test, but it cannot be denied that we hear matters now spoken of in society, not only in the presence of women, but sometimes by themselves, in connection with cases which are, or have been, before the Court, to which modesty would not, a few years since, have dared to so much as barely allude. The publicity given to what passes in the Court lends a notoriety to any case in which persons of position may be involved, or in which any revolting or peculiar incidents arise, and thus it becomes for a time the topic of the day; the guilt or innocence of the wife or husband is canvassed with as much freedom as the merits of a candidate for an election, and although this may possibly be done without an impure thought, still it is certain that even the unconcerned allusion to such matters must have a tendency to lower the standard of morality.

It has been urged, and not without reason, that the publication of the cases heard in the Divorce Court is offensive to decency, and tends to demoralisation. But with our free and liberal spirit, with our love of candour and fair play, we

instinctively view secret procedure with jealousy, and look with an eye of dissatisfaction on the closed doors of a court of justice. In deference to this feeling, a clause, empowering the court of its own motion to close its doors, which had been inserted in the amending Divorce Act of 1859, at the instance of the then judge of the court himself, was expunged in committee. The late judge, consequently, although asked to do so, refused to sit otherwise than with open doors.* Previous to the rejection of this clause the court did close its doors when, from the nature of the case, it was desirable that the facts should not transpire; or when asked to do so by either of the counsel in the cause, no objection being made on the other side. A similar practice prevailed in the Ecclesiastical Court, where cases were frequently heard in *Camerâ*, as it was termed, and although the door was not actually closed, no one was present save those engaged in the cause, and the reporters of the court. Again, equity judges frequently hear cases in their own private room, when a hearing in open court might give pain to the parties, or furnish objectionable details. But whatever may be said of the scandals disclosed by the Divorce Court, although no palliation, it must still be said that other courts, both civil and criminal, equally offend—nay, the instances of domestic immorality are ofttimes far more gross, and the violations of decency far more glaring—yet the doors of those courts are not closed; so that it must be left with those who report for the public newspapers what they will publish and what they will suppress: they can do much towards raising or weakening the standard of morality amongst us, and although it may be said that on the whole they abstain from circulating what is positively disgusting, they are not so scrupulous in denying the cravings of unbecoming pruriency. Some of the recent reports will support and illustrate our meaning. People, from idle curiosity, or probably from a worse motive, will throng the courts; but if no one was

* *Hall* v. *Castleton*; Sw. & Tr., 606.

admitted, their fancy might suggest worse than the reality. The secret mystery would generate inventions which none could deny, and thus decency might be shocked more by fictitious statements than by actual facts. It is, however, satisfactory to find that the present judge of the court has resolved to hear such cases as require it in his own private room.

One of the evils apprehended from the alleged facilities of divorce was collusion, as it is termed, whereby a husband and wife desirous of seeking other alliances, might, either between themselves or in conjunction with a third party, purposely do some act or fabricate some charge which might bring them within the pale of the court. No doubt this may be done; we have been informed on good authority, that the dissolution of a marriage was obtained in one case in which the whole of the *res gestæ* was a fiction; there had been no adultery committed; the alleged co-respondent was a myth conjured up for the purpose. Cases of connivance have also occurred; some, however, did not escape the vigilance of the court. The provision in one of the amended Divorce Acts, that every decree for a divorce shall be in the first instance a decree *nisi*, not to be made absolute until three months afterwards, so as to enable the Queen's proctor, or any other person, to inform the court if the divorce has been obtained by collusion, or by anything done contrary to the justice of the case, has tended to prevent this abuse of the court. The Queen's proctor is stimulated to do this by having his costs secured to him, and the frequency of his intervention shows the propriety of lodging some such power somewhere.

In the year 1858, 244 petitions for dissolutions of marriage were filed; in 1859, 211; in 1860, 210; in 1861, 187; in 1862, 200; in 1863, 255; in 1864, 232. There is not here a very great fluctuation or increase; in fact, the last year produces less applications for complete divorce than the year preceding. It is true that 1863 is more productive than 1862, but we do not think that is a sure test of the increase of a wish for divorce, nor, on the other hand, do we conclude from the

smaller number of last year that there is a decreasing desire for it; in other words, that matrimonial infidelity is affected in either way by the establishment of the Divorce Court. The average number of prayers for dissolution of marriage of the seven years the court has been in existence is 210. Taking into account the population of England, and bearing in mind that the majority of petitions emanate from persons verging on, if not actually of, the lower strata of society, we boldly state that it speaks rather in favour of our morality than otherwise; and we also add, without hesitation, that it does not show that the constitution of the Court of Divorce has been productive of those evils which its opponents predicted. We further find, from the information furnished to us from the registry, that in the year ending January 1, 1864, the petitions for judicial separation were 66; for nullity of marriage, 15; for restitution of conjugal rights, 17, making in the aggregate 98 cases; whereas, in the year 1863, there were only 43 applications for judicial separation, 9 for restitution of conjugal rights, and 7 for nullity of marriage, making a total of 57 cases as compared with 98 of the following year; but if we take the whole of the cases in which the aid of the court has been invoked, we find that the whole from all causes was, in 1863, 323, in 1864, 330, an excess of 7; and if we spread all the cases over the seven years the court has been in existence, the average is 210 in each year. This does not show a very great desire on the part of the nation, as a whole, to seek redress from the court.*

We would here revert to Mr. Bishop's first volume, wherein at p. 38 he contrasts the morality of that State, South Carolina, where divorce is not allowed for any cause, with that of the States which permit it. He says, "Not only is adultery not indictable there, but the legislature has found it necessary

* The cause list just published contains 100 cases ready for trial. The list for the last term contained 133. That, however, included several cases which stood over from the previous term. In Hilary Term, however, all the cases ready for hearing were disposed of, so that the whole 100 cases now waiting for trial are fresh cases; we think it but right to state this after the above remarks.

to regulate by statute how large a proportion a married man may give of his property to his concubine; a fact well sustaining the proposition that where divorces are not allowed, meretricious connections will be formed, for legislation is never resorted to except where there exists the subject-matter for it to operate upon."

In concluding this article we cannot but rejoice that at length steps are to be taken to assimilate the marriage law of the three portions of the empire, and it is to be hoped, if not expected, that the Commissioners appointed by the Crown for that purpose will give their attention to the discrepancies between the Law of Divorce as well as of Marriage in England, Ireland, and Scotland; each has its own separate and differing mode of procedure. It has been held that the English Divorce Acts do not extend to Ireland or Scotland. An attempt was made to include Ireland, but with no effect. To include Scotland was felt to be hopeless. Thus Ireland retains our old matrimonial law, with its action-at-law, its suit in the Ecclesiastical Court, and a final resort to Parliament. Scotland is also left to its ancient practice. There either husband or wife may obtain a complete divorce on proof of the adultery of the other; continued desertion for four years is also considered a just ground for dissolving a marriage. This strongly contrasts with our English practice; how far they may be brought into harmony it is difficult even to hazard an opinion. We must first induce that people to put their marriage law on a most sure and reasonable footing, and if we succeed in that, we may have hopes of further progress.

Art. V.—FOSS'S JUDGES OF ENGLAND.

The Judges of England, with Sketches of their Lives, and Miscellaneous Notices connected with the Courts at Westminster, from the time of the Conquest. By Edward Foss, F.S.A., of the Inner Temple. Vols. VII., VIII., and IX. London: Murray, 1864.

A REVIEW of the first six volumes of this work appeared in this periodical in 1858, and will be found in Vol. VI. pp. 31-60. That article, written by a deceased and respected contributor, paid a just tribute to the research, the studious care, and the ability which distinguished the portion of the work then under consideration; and, notwithstanding the views we entertain respecting the merits of the last of these three volumes, we willingly adopt the opinion already expressed in our pages of the general excellence of the whole, and of the credit as a judicial biographer to which the author we consider may fairly lay claim. The first review we published, however, was devoted rather to the vindication, we had almost said to the rescue, of the characters of the English judges of former ages, from the ignorant and unjustifiable denunciation of certain lay historians; and, from this tendency of the biographical and historical literature to which we referred to vilify and depreciate the character of judges of times past, we showed that the works of such a writer as the late Lord Macaulay were not wholly exempt. It is indeed not a little singular how erroneous and mistaken the non-legal community, even the most intelligent and best informed, almost invariably are, when they attempt either timidly to feel their way, or recklessly to plunge, into the domain of the law and the lawyers; their erratic course being generally taken in a spirit of hostility to our profession, and with them indeed, it is a pleasant proverb that, for honest men such as they, we

are "fair game." It is true that in the result, and before any particular mischief is finally consummated, the lawyers generally have the best of it; or rather the laity give up a discussion which they find they don't understand. But in the meanwhile much prejudice is occasioned to the sound development of the science of jurisprudence, and the amendment of the law is retarded, if not obstructed, by unworthy imputations on judges and others who are regarded by the lawyers as their peculiar authorities. While we write, we are pained by the flippancy with which insinuations of a deeply incriminating nature, at first eagerly taken up and unreservedly expressed, have continued to be malignantly pursued against a high judicial officer, who, whatever his idiosyncracy, is a man of great and remarkable abilities, and the dignity of whose office and functions ought to protect him from the hasty judgment of the country. And with regard to another illustrious man, even greater and more remarkable in every quality than the one we have mentioned, we need only express the hope that he despises as thoroughly as we do the wretched curs who have been barking at his unassailable reputation. BROUGHAM—Henry Brougham—is a name the very mention of which ought to make the persons we allude to tremble and cower; and in the name of the law, of the greatest of our modern parliamentary annals, of liberty, of education, of the diffusion of knowledge, and of social advancement, we would hurl them from the gaze and audience, which they have presumed to court.

Mr. Foss, in his first volumes, had few such great luminaries to treat of; but even under the Stuart kings he has found judges who are infinitely the superiors of their detractors, and of writers who, as was remarked in our former review of this work, while they fervently denounced and held up to scorn real, unquestionable, proved judicial delinquencies, took no trouble at the same time to point out, and duly to extol, the really great deeds of the judges of past times; how they had ever and anon stood between the Crown and the people, establishing in very early times, and never deviating in later times from their

maxims, *in favorem vitæ*, in restraint of taxation, counter to restraint of trade, and in a thousand other ways earning the applause and devoted attachment of the nation, which in no way did they seek or bid for. The slanders on Lord Mansfield —slanders first given expression to in the malignant language of Junius, but now displaced by the intelligent eulogy of legal enlightenment—is another instance of the popular and literary ignorance we have pointed out. Lord Mansfield was, in the judgment of these insular empirics, a judicial despot, a political tyrant, an un-English lawyer, because he attempted to introduce into the procedure of his court what were called the arbitrary principles of the Roman law, but what were really those fine maxims and rules of jurisprudence which every other civilised country in the world, including our own Scotland, had found it for the interest of their civilisation to adopt. It had been better for the law of England, at the present day, if Justinian rather than Junius had been the study of those times. But we are now rising superior to all such barbarism, and gentlemen who think they are doing their duty as lawyers in talking to juries, turn away abashed when they are confronted with the doctrines of legal science. The excellence of the Jacobite judges, and the independence they displayed on great occasions, are all the more remarkable when the relation in which they stood to the Crown is considered. They held their appointments during pleasure, and not for life; and yet, as was shown in the former review, it was from judges so situated that have been handed down to us these great doctrines of a free country, "The law of God and the law of the land are all one, and the one and the other prefer the common and public good of the land. The common law hath so admeasured the king's prerogatives, that they shall not take away or prejudice the inheritance of any. Arbitrary imprisonment is unknown to the law. The air of England is too pure an air for a slave to breathe. A royal proclamation is incompetent to make new law, or to impose fine, forfeiture, or imprisonment. The king's grant is of no power to prejudice the subject's interest. No

statute is to be extended to life by doubtful words." These are not the principles of servility. They were repeatedly asserted, and they were all of them finally established in practice by the courts, unaided by Parliament, and in times when the occupants of the courts held as tenants-at-will of the Crown.

Such were the views which the examination of the first six volumes of Mr. Foss's work appears to have suggested to the mind of their reviewer. But we need scarcely say, and to the credit of Mr. Foss be it said, that there is a vast deal more in the work than the personal peculiarities of the judges enumerated. Its copiousness of matter was to some extent acknowledged in our former review, when the books, reports, trials, histories, MSS., and numerous other authorities, laboriously studied by the author, were mentioned. The labour and research, however, of the work, at once speak for themselves in it, and stand indeed in need of no external notice. It were more appropriate to the service it must be allowed to have rendered to the learning of the profession to observe that it is calculated, in many respects, to remove the difficulties of students in tracing and following the course of the law; and in continuing, as it were, by means of the portraiture of judicial expounders, that "school of legislation" of which the "Twelve Tables" was the sublime commencement. The fresco in Lincoln's Inn Hall expresses the idea we have indicated with historic fidelity; and with Mr. Foss's work in his hands, we could imagine the artist finding himself prepared still further to proceed, until we had presented to our view other judicial and legislative forms and figures more immediately typical of the living law of England.

Mr. Foss introduces the three volumes which it is the more immediate purpose of this article to consider by a brief statement which is characterised both by modesty and candour. We would have been better pleased, however, if he had expressed himself in language somewhat more independent, and from which it would not have appeared that he had so much to

acknowledge. He himself must, on reflection, admit that such a sentence as the following, however deferential, and however kindly meant, is not calculated to enhance the authority of the biographies alluded to. He says—

"If the notices I have offered of some of the living judges are extended beyond the limit I had (thus) prescribed to myself, I am proud to owe the additional material to the encouraging kindness of those among them—extending to nearly twenty, acting and retired—who have deemed my former sketches not quite unworthy of their approbation. To them I beg to express my grateful acknowledgments."

We are better pleased when he tells us that no material blunder has hitherto been pointed out by his critics; "But," he adds—

"To speak in the military language of the present day, though I have passed through many general reviews with approving remarks, I fear that, in a minute inspection, many deficiencies may be discovered. To rectify these will be my earnest endeavour, as it has been my anxious wish from the outset to produce a work—the want of which was universally felt—in which full confidence should be placed; a work which, while it gave a truthful biography of all the English judges, should also contain an accurate history of the progressive changes in the superior courts of Westminster Hall. My labours to effect this consummation have been the delightful employment of a long series of years, encouraged as they have been by many whose opinions command respect, and assisted by all to whom I have applied for aid and information."

Of these three last volumes he states the first completes the legal history of the Stuart dynasty, and the other two contain that of the Hanoverian family, including the present reign. Mr. Foss opens up the first of these by exposing the extraordinary reaction that was given to the procedure of the courts on the restoration of Charles II. During the Usurpation, an Act had been passed by which the Latin language was displaced for English in the pleadings. But on the Restoration, it appears that that valuable measure was not allowed to be in

force beyond August 1, 1660. From that date Latin was resumed, and continued to be employed for upwards of seventy years; till in the reign of George II. English was again substituted by an Act of the Legislature; and, adds Mr. Foss, with a fine irony, "litigants were permitted to *understand* (*!*) the allegations for and against them." A more audacious assertion surely was never made by a legal writer—or is it nothing more than the fly in the amber? Is this the way an author who publishes in the year of grace, 1864, can write or even think of such things as "novel assignments," "negatives pregnant," "duplicity," the "*replication de injuria*," "special demurrers," and that darling offspring of black-letter stupidity, "singleness of the issue?" These were some of the pretty things that litigants were permitted to understand, forsooth! The truth must be told. The substitution of English for Latin could scarcely be called any improvement at all, for it did not secure the full and free use of the mother tongue, and the pleaders were not at liberty to select such English terms as best expressed their meaning. The English was got at second hand, being neither more nor less than a translation of the old Latin, and this is the real source of the unintelligible technicality, the injustice and nonsense, by which the practice of the common law was too long scandalised. As we do not know what branch of the profession Mr. Foss belongs to, we will not impute to him a want of knowledge with which he may not be justly chargeable; but surely, if he is acquainted with the history of pleading, he would have hesitated before he made use of expressions which partake unduly of an *ad captandum* character. We wonder, indeed, he did not follow out the idea, and, taking the cue from the articles of the Church of England, point out with a blatancy that would have delighted the non-intellectuality of Exeter Hall, that the courts, like the Church, had adopted a language that was "understanded of the people." But, passing over the rather unfortunate sentence on which we have commented, we read with interest that during this reign

of Charles II. many new statutes for the reformation and amendment of the law were enacted—the Statute of Frauds and the *Habeas Corpus* Act being two of them.

Mr. Foss points out the baneful influence of party politics on judicial appointments during this reign, and yet an influence that is too much felt and understood even at the present day. The Government of Charles was at the first more virtuous, and by their excellent appointments, including no less than the retention of nine judges who had been appointed, and acted, during the Interregnum, showed themselves impressed with the desire to fill the bench of justice with men of purity and learning.

"But," observes Mr. Foss, "in the latter half of the reign, when the violence of party spirit was at its height, and when one or the other faction had an object to attain, no hesitation was exhibited in removing those judges who were deemed too honest and conscientious, and in raising others to the judgment-seat who were cringing candidates for popular applause or courtly favour, and who were likely to prove supple instruments of the ruling powers. Thus we find, among those who were elevated, such men as Scroggs, Saunders, Jeffreys, Wythens, and Wright."

And he adds, that of the fifty-five individuals who held the judicial office during the reign of Charles, no less than twelve were removed for political causes. And he notices the well-known attempt to make the judges subservient to the Court, by substituting *durante bene placito* in their patents, for the old constitutional form, *quamdiu se bene gesserit.* In stating these particulars, and giving the lists of the judges of the different courts, nothing is more remarkable than the care Mr. Foss exhibits, and the studious nicety with which the most minute details have evidently been elaborated by him. We are also treated to an interesting account of the costume of the judges, historically detailed. This, we are persuaded, will be so attractive to many of our readers, that we cannot resist giving the following extract:—

"Whatever changes were introduced in the costume of the judges during the Interregnum, of which we have no particular account, it is certain that, at the Restoration, the customary robes in which they had been habited since the reign of Edward I., were adopted. The only peculiarity which is noticeable is that, by various entries in the Crown office minute books, it appears that on the swearing in of the chiefs of either of the courts, their robes were put on by the other judges.

"But though the robes were unchanged and unchangeable, the minor habiliments of the person followed the fashion of the period. Thus, we find that, from the reign of Elizabeth to that of Charles I., the ruff, greater or smaller, according to the fancy of the wearer or the cut of the time, ornamented the throat of the judges, as well as of the male and female gentry. But towards the end of the reign of Charles I., this gave way to the falling collar, more or less ornamented with lace or embroidery. This became in more recent times the band, worn both by legal and clerical men, as a necessary part of their costume; and though it only arose from the prevalence of fashion at the time it was introduced, there has gradually grown such an absurd forgetfulness of its origin, that I have seen, on the bench, at the bar, and in the pulpit, the modern stand-up collars with stiff dogs'-ears shading the chin, mounted over the professional band of ancient cut."

The professional wig, to which so much forensic virtue is attached by the populace, appears to be a comparatively modern innovation in the history of the Bench and Bar. In fact, the use of it may be said to be coeval with the Revolution, although we have never heard it said at the present day, that the lawyer's wig was an anti-Jacobite ornament. Mr. Foss says:—

"The forensic head-dress of lawyers which had hitherto prevailed, underwent a great change in this reign. The portraits of the judges that have come down to us of previous reigns, and through the greater part of this, exhibit the judicial head covered either with a coif, a velvet cap, or a cornered hat; the upper lip ornamented with a moustache, and sometimes the chin graced with a beard.

The latter superfluity had long been discarded; the moustache now gradually disappeared, and instead of the coif or cap, the periwig, now introduced from France into this country, began to be adopted by the bench, with the pretence of a coif attached to the back of it. The wig, however, was not universally worn; for though the portrait of Sir Creswell Levinz, who was superseded in 1686, displays this appendage full bottomed, that of Sir Thomas Street, who continued to sit on the bench during the whole reign of James II., is depicted with his own hair and coif cap. The wigs in this reign were innocent of powder, as far as can be judged by the shadings of the pictures, and had not certainly attained to the formal cut of the present day."

The collar of SS., the exclusive badge of the two Chief Justices and the Chief Baron, here also comes in for interesting notice at the hands of Mr. Foss. He tells us that the reason of its having been limited to the chiefs of the courts has not been precisely ascertained, and that its history, which is involved in some obscurity, is discussed and illustrated in a paper supplied by himself to the "Archæologia Cantiana," Vol. I., pp. 73-93, and a summary of which paper is given in the volume before us. Various theories on the subject are mentioned, to be rejected by Mr. Foss, who favours the conjecture of Mr. Beltz, that the letter S means *Souvenez*, as part of the motto. Mr. Foss, however, observes—

"'*Souvenez-vous de moi*' seems to me to be nearer the mark; and I am inclined to believe him to be right with respect to the word intended to be signified, whether he be correct or not in considering it to be the abbreviation of the motto. The simple word is sufficiently suggestive, and one very likely, in those days of romance and sentiment, to be adopted as a motto by itself. That it was so, is proved by an entry on the Issue Roll of 8 Henry IV., which records that a goldsmith was paid the large sum of £385 6*s.* 8*d.* 'for a collar of gold, worked with this motto, *Soveignez*, and the letter S, garnished with a great variety of valuable jewels.'"

None of the present collars, it appears, can boast of any

antiquity, except that of the Chief Justice of the Common Pleas, which is said to be the one worn by Sir Edward Coke. In favour of that boast, however, there is we are told no other evidence than tradition, the earliest date that can be positively traced being 1714, when Lord Trevor received it from his predecessor. Mr. Foss adds—

"From that time to the present, there is clear proof of the succession. On Chief Justice Tindal's death, in 1846, his representatives transferred it to his successor, Sir Thomas Wilde (Lord Truro), without requiring any money payment, on the understanding that it should remain for ever as an office loom, for the future Chief Justices of the Common Pleas."

We are reluctantly obliged to break off. We hope to conclude our review in our next number.

Art. VI.—THE BAR SCHEME FOR THE AMENDMENT OF THE PRESENT SYSTEM OF LAW REPORTING.

THE recent circulation among the profession of the preliminary address by Sir Fitzroy Kelly, the Chairman of the Council of Law Reporting, issued in accordance with the scheme of the Bar Committee, has at length brought the question of the possibility of a remedy for the long admitted evils of our system of law reporting to a precise and practical test. The proposed test is this. Are there 2,000 members of the profession willing to come forward and subscribe five guineas per annum to provide a remedy, that remedy being the establishment under professional, as opposed to commercial control, of one set of reports, to be so conducted as regards careful and skilful preparation, and expeditious and regular publication, as to be worthy to be accepted by the several branches of the profession, as the only authority for the future for case law? A copy of this address will be found printed at length in the "Events of the Quarter."

The importance of the suggested remedy, as affecting the interests of the profession and the public on the one hand, and the interests of the various parties engaged in the existing system, whether as reporters, publishers, or proprietors, on the other, forces the question at the present moment on our attention. However great some may think the evils of the present system to be, and with whatever zeal, perseverance, and disinterestedness, some may strive to bring about a change which they believe to be desirable, it must be borne in mind that the interests to be affected are large and important; that the steady judgment of the profession is not likely to be suddenly wrested from a system to which it has become accustomed, imperfect though it be, to another that is new and untried, without subjecting the proposed change to a severe scrutiny both as to principle and detail. The legal profession is cautious, even to a fault, and certainly is not apt to be caught by novelties, however specious and plausible; and those who seek to obtain its approval of a change in a matter of such importance as the subject of law reporting undoubtedly is, must not think themselves harshly or discourteously dealt with if they find that their motives are questioned, their designs cavilled at, and their project severely handled. Against the disinterestedness of the motives and singleness of the purposes of those who have been prominent in the present movement, we have no ground for suggesting a suspicion or a doubt. Whatever may be thought or suggested to the contrary by some, we cannot think that any of the members of the Bar Committee or any of the members of the council have the least expectation of personal benefit or advantage to themselves, nor can we recognise any among them who can be suspected of volunteering their labour in the cause in the hope, or with the intention, of forwarding the interests of relatives, dependants, or friends. Of the value and efficiency of their project, as now before us, it is our province to judge, and our duty is to examine it closely, but not in a churlish or unfriendly spirit.

In our Number for November, 1864 (No. XXXV. N.S.), the principles and details of the scheme were discussed in an article, to which we would refer our readers. When that article was published, the report and scheme were before the profession for consideration, and had not then been adopted by the Bar. Afterwards, as the address informs us—

"On November 28, 1864, a further meeting of the Bar was held, under the presidency of Sir Roundell Palmer, as Attorney-General, when the report having been considered was adopted. In Hilary Term, 1865, the report and scheme were submitted to the several Inns of Court, Serjeant's Inn, and the Incorporated Law Society, for their consideration; and the Benchers of Lincoln's Inn, the Inner Temple and Middle Temple, and the Incorporated Law Society, have recently appointed members of the council in conformity with the scheme—Gray's Inn has declined, and Serjeant's Inn has not at present decided to appoint members of the council." *

The course taken by Gray's Inn was, we think, unfortunate, but we are glad to find that it did not prejudicially influence the other Inns of Court. The course taken by them was, in our judgment, no more than a proper deference to the Bar, which, in the only manner in which it can speak in its collective capacity, had expressed its opinion upon a matter of professional interest and concern; in such a way as to render it becoming, to say the least, that the governing bodies of the Inns of Court should, as trustees and representatives of the Bar, lend their assistance. The terms of the Gray's Inn resolution, as published, were that "they had not sufficient confidence in the scheme to induce them to join in it." Resting upon this special ground, if it should hereafter appear that the general body of the profession manifest confidence in the scheme by offering to support it to the required extent, it will still be open to Gray's Inn to join and appoint one member of the council, and they may then do so. As regards the non-adhesion of Serjeant's Inn, we think that course was to be expected, because the resolution of Serjeant's Inn is

* See note at the end of this article.

substantially the resolution of the common law judges, and however much they may disapprove of the present system, and desire that a remedy should be found for its evils, they would prefer, and their proper course would be in such a matter, to confirm by their authority when taken, a resolution of the profession, rather than to promote by their influence a mere project.

The course taken by the Incorporated Law Society is what might have been expected from men of business. From the published communication which passed between the President of the Council and the Attorney-General, it appears that when the report and scheme, accompanied by the resolutions of the Bar, were communicated to the council, they at once signified their approval of the principle and objects of the scheme, but declined to share the responsibility of endeavouring to carry them into effect, by appointing two members of the council of Law Reporting, until they had had an opportunity of examining the financial and other details of the scheme, and been satisfied of their soundness. This opportunity having been afforded to them, and being satisfied from their own examination that the scheme was financially sound, they subsequently signified to the Attorney-General their entire adherence, and not only appointed two members of the council, but voluntarily added to the proposed guarantees of the Inns of Court a guarantee of their own equal in amount to that of the three Inns of Court. This guarantee provides for the preliminary expenses of the council.

So far the scheme appears to have been matured and launched as the carefully considered proposal of persons thoroughly competent to understand what they are about.

Sir Fitzroy Kelly's preliminary address is the first step which the scheme suggested should be taken towards bringing the matter before the profession—an invitation to the profession, in all its branches, to co-operate in accomplishing the object involved in the resolutions of the Bar—that is, the establishment of one set of reports under the control and

management of the profession, through the medium of a permanent council to be incorporated by charter or Act of Parliament; but excluding all commercial profit.

The object aimed at, viz., one set of reports which should be accepted by the whole profession as the only standard of authority, though it may seem startling to us, who have been so long inured to a multiplicity of reports, is no novelty. In this journal for the years 1848, 1849, 1853, 1855, articles will be found urging, in a variety of modes, one set of reports as the proper remedy. In the reports of the Law Amendment Society for the years 1849 and 1853 the same remedy was insisted upon; and even at an earlier period, in the year 1843, the *Law Times* advocated the same remedy for the same evils. In Vol. II., p. 28, of that periodical, we find the following passages, which we extract for their singular applicability to the present state of things.

"And still a greater grievance is the variety of reports. Why should the profession be put to the cost of purchasing three or four different series for the same court, in order to procure all the important cases there decided? Why is not one series at least made complete? The cure for this would be the publication of one authorised series of reports, to comprise all the cases in all the courts, which alone should be acknowledged by the judges, and which should be taken by competent reporters, and reviewed by the judges in all cases of great importance. These should be printed in the cheapest form, and sold at the lowest price that would repay the cost."

It is due to the *Law Times* to observe that, with persevering consistency, it has ever since advocated, and still advocates, the same remedy; though of late it would seem with a leaning towards an official system.

The address thus summarily puts the case in favour of one set.

"It needs surely no argument to prove how deeply the interests of the public are concerned in the certainty of the law, or how important it is that the judge who decides, the counsel who advises,

and the solicitor under whose guidance the client acts, should all be regulated by one and the same standard of authority."

Whether that unity can be attained by any mode short of an official system, established and supported by Government, with exclusive citation authorised by Act of Parliament, is, with many of those who are deeply impressed with the evils of the present system, and anxious to devise a remedy, a matter of grave doubt.

A careful perusal of the report and scheme of the Bar Committee, will, we think, suggest the idea that several of its leading members were inclined to the opinion that a system of official reporting, under the responsibility of Government, was in principle the truest form of remedy; but that the great and admitted difficulties involved in the successful establishment of an official system—difficulties mainly of finance and patronage—were the inducements which ultimately led to the adoption of a scheme based upon professional management and control.

The report states thus:—

"Mr. Montague E. Smith (now Mr. Justice Montague Smith) moved a resolution as follows: 'That the committee recommend the principle of official reporters, such reporters to be appointed by the Lord Chancellor and to be paid by the State; the reports to be sold under the authority of Government, compensation being afforded to existing interests.' The discussion upon this resolution was, with the consent of Mr. Smith, postponed until it should be seen whether any scheme of amendment would be sanctioned by the committee, which should not be based upon Government patronage and control. Several proposals, in various forms, but each founded upon the principle of establishing a system of reporting under the regulation and control of the Bar, were next laid before the committee; these formed the basis of the scheme adopted. Mr. Smith's motion was therefore not pressed. Mr. Dickinson moved a resolution embodying a principle applicable to any set of reports to be so established, as follows: 'That no case reported by reporters under such supervision and control should be quoted from any other

report, but this not to interfere with the quotation from any other report of cases not already so reported.' This resolution was negatived; the committee considering that such a restriction, although in the opinion of several of their members very desirable, should not form part of the scheme."

It would thus appear that neither the broad question of an official system, nor the narrower question of exclusive citation, was at any time absolutely negatived by the committee.

The principle upon which a system of reports under the control of the profession rests, appears to be a mean between uncontrolled commercial enterprise on the one hand, and exclusive Government authority on the other; an endeavour to avoid the evils which have sprung from the laxity of the one, and those which it is supposed would spring from the authorised monopoly involved in the other.

Disregarding mere theories, the committee must, we conceive, be understood as desiring to suggest a remedy which, by putting a restraint upon the present trading system, would be a cure for such of the existing evils as have sprung from trade; and, by establishing professional control for the future, would at the same time be a protection against those evils which are inherent in a monopoly. Whether this *via media* can be safely opened up for the good of the profession and the public, seems to be the problem which the scheme aims at solving.

The danger that has first to be encountered is the fear that the attempt to establish the proposed set of reports may increase the present evils, by adding another to the six existing sets. The scheme endeavours to avoid this danger by proposing what in effect would be a fusion of all the existing regular reports, consisting at present of no less than fifteen independent publications, costing in the aggregate about £30 per annum—the Chancery series alone costing at least £11. This fusion, if it could be accomplished, would, without question, be a result in itself worth the struggle; but its success must, we conceive, depend upon the

consent of the reporters. The publishers, we believe, care but little for the regular reports; the circulation has become so diminished through the effect of competition, that there is but little trade profit to be made out of them now-a-days, and the reporters have become the persons chiefly interested. Can the consent of the regular reporters be procured? It is hardly to be expected that parties in their position will disclose the real extent and value of their interests, and we don't see that the council have means at their disposal for overcoming anything like a general or combined opposition. In fact, as the scheme proposes (Rule 11) (though this proposal is not specially noticed in the address) that the appointment of reporters should be subject to the approval of the chief presiding judge, it may be taken for granted that the judges as a body would not sanction appointments made in disregard of the interests of the present reporters. The council must, therefore, in the first instance, deal with the existing reporters. And it seems to us that their consent can only be expected, if it be made reasonably clear that their interests will be advanced by the change—assuming, of course, their ability and willingness to discharge the duties in the manner which would be required under the proposed system. To enable the council to do this they must depend upon obtaining, as a preliminary, the support of the profession to a large extent. The address does not, indeed, in express terms speak, as the scheme does, of the interests of the regular reporters being the first to be considered. It speaks rather vaguely of the establishment of one set of reports upon the basis of a fair regard for existing interests. This might imply an intention to disregard the regular reporters, and might point to an arrangement with the *Law Journal*—but we have no doubt that the intention of the address is to carry into effect the precise recommendations of the scheme, and that, for the reason we have given as to the approval of the judges being necessary, any other course would be impracticable. It may, therefore be concluded that

if any regular reporter should be left out, it would only be in consequence of his own unreasonable refusal to come in. In arrangements which are proposed for the benefit of the profession and the public, obstructions by individuals, on the mere ground of private interest, would hardly be recognised by the judges or the profession as the legitimate exercise of a right, and though we cannot conceive that any regular reporter would prove merely obstructive, yet if such a case should occur, we think he ought not to be considered as entitled to stop the scheme by his veto, nor ought he to complain if he is left to make himself conspicuous by his absence. It may be an unpleasant truth, but the fact is not to be gainsaid, that if the profession came forward in sufficient numbers to establish the scheme, subscription to the proposed reports would probably imply withdrawal of subscriptions from all others, and we do not know of any existing series of regular reports that could be profitably continued after a permanent withdrawal of even 500 subscribers. The scheme not only contemplates, as we read it, the fusion of the regular reports, but also (Rule 26) provides that arrangements may be made by the council which, for an adequate consideration, shall lead to the discontinuance of any set of existing reports. This we imagine is intended to apply to the *Law Journal.* The weekly series are not, and do not profess to be, of such a character as could be properly dealt with by the council with a view to the establishment of a permanent series. A fusion or amalgamation of the regular reports and the *Law Journal* would in our judgment be a most desirable thing for the profession and the public; and the council would no doubt act wisely in striving to accomplish it if in their power. But here the practical difficulties will probably be greater than with the regular reporters. The *Law Journal* has become a successful commercial undertaking, and is now yielding a larger profit to its proprietors, than we believe any other set of reports; and these parties cannot be expected to sacrifice themselves for the

public good. We don't see our way to suggest any definite plan which would be satisfactory. The purchase of the proprietory interest by payment of a sum down, would be out of the question. The scheme (Rule 26) appears to limit the consideration to be paid for the relinquishment of any set of existing reports to a payment during a limited period out of profits to be postponed to payment of the necessary expenses of printing, sale, and management, and the guaranteed salaries of the reporters. The payment of a consideration in such a mode is one to which the proprietors of the *Law Journal*, in its present state of financial prosperity, would be naturally unwilling to submit. At the same time there are considerations affecting the position of the *Law Journal* which cannot be lost sight of. As a commercial property it must be subject to all the risks and contingencies which affect the commerce in which it is engaged. If the interests of the profession and the public require that a radical change be made in our system of law reporting, by substituting professional control for commercial management, the consequences of that change, whatever they be, must be submitted to by the *Law Journal*. The profession and the public have a right to require to be served in the manner which they deem best for their own interest, and those who desire to profit by serving them must be guided by events as they arise. If the *Law Journal* resolve, as probably it may, to stand aloof, let us consider what may happen. The proposed reports would be more complete and comprehensive than those of the *Law Journal* now are, or, with reporters inadequately remunerated, ever could be. Not only will they comprise the reports of all the courts, including the Appellate, but they will be so conducted, if we rightly understand the scheme, that the decisions of the year shall, as far as practicable, be published within the year; a result never yet attempted by the *Law Journal* or any other set of reports, but a result easily attainable under a management which does not seek to realise a trade profit, for it is plain to our minds that when a case has

been argued and decided, it is ready to be reported; and we are satisfied that under a well-arranged system of reporting (of which adequate remuneration to reporters would be an essential element), the proper preparation of the report need not involve a long interval of time, though it would involve the personal attendance of the reporter throughout the argument and the judgment, together with prompt and convenient access to all necessary papers. The *Law Journal* is, beyond all doubt, a valuable publication, so far as regards its reports of cases in the Courts of Common Law, but it is not considered to be equally so as regards its reports of cases in the Courts of Equity or the Appellate Courts. This fact is notorious, and the dissatisfaction that is felt by practitioners in Equity at the deficiencies of some at least of the regular Chancery Reports, and the character of the Equity Reports in the *Law Journal*, may have led to the impression, which we know has been felt in some quarters, that the recent movement was only that of the Equity Bar, and was not supported by the Common Law Bar. In making these observations as to the *Law Journal*, we are only referring to facts as they affect the public interests. The reasons for these facts are equally notorious with the facts themselves. In the Common Law Courts the *Law Journal* has the advantage of access to, and the use of, the judge's written and revised judgments, but it does not enjoy the same advantage to the same extent in the Courts of Equity. In these courts, as a rule, the judges only communicate their written and revised judgments to the regular reporter of their respective courts. This want of uniformity in the practice may well account for the different degrees of merit in the reports. If the proposed set were established and maintained according to their contemplated completeness and efficiency, a prejudicial effect might be produced, if not upon existing, at all events upon new subscriptions; and a prudent regard for the probabilities and possibilities of the future would be matter of present concern to those interested in the

Law Journal. Another consideration presents itself which should not be lost sight of. In the proposed scheme two important principles, the one dependent on the other, lie at the foundation of the difference between the existing and the new system—we mean the liberal remuneration of reporters, and the exclusion of all commercial profit. Experience seems to have shown that under a system of competition the two cannot exist together. Now, in considering the amount of compensation to be paid for any proprietary interest, the question would have to be asked, how far are its profits affected by the amount of remuneration paid to its reporters? Could it fairly be expected of the profession that they should pay a large compensation for trade profits which are realised at the expense of one class and to the injury of the other?

The difficulties which beset the question are obviously many and great, but they spring naturally and legitimately from the interests which have to be dealt with. They will not be avoided by shutting our eyes to them. They lie in the path, and must be surmounted. The mode of surmounting them, will, we think, be aided by discussion; that they are capable of being surmounted by mutual moderation and fairness, we are satisfied; that it is for the interest of the profession that they should be surmounted, we are satisfied also. And it lies with the profession itself to supply the means of surmounting them. If the profession generally feel the evils of the existing system, and, approving the proposed change, desire to see it brought about, their course is to support the council in the manner proposed, and means adequate to accomplish the object would be thereby at once brought into existence.

Objections that the proposed change is an interference with the principles of free trade are so idle as to be hardly worthy of notice. It has been again and again pointed out that law reporting is a matter of public concern, and not properly the subject of trade at all, and that the evils of the present system are traceable to the desire to secure a trade profit, for which object the public interest is made to suffer. But assuming it

to be desirable that law reporting, though a matter of public concern, should be left to private enterprise, what is more in accordance with the strictest principles of free trade than that the parties directly interested should, by co-operation among themselves, secure their own supply? Objections to the principles of co-operation are founded upon the inadmissible claim of vested interests to protection.

We do not venture to indulge in any prophecy as to the success or failure of the present attempt at amendment; we think, however, it augurs well to find that it has been favourably received in Scotland and in Canada, and also in America. In fact, as far as we know, it has met with little opposition save from those whose interests naturally lead them to oppose it, and from them opposition must be expected.

It may be useful perhaps to consider a little the principles of control on the reports as sought to be applied through the medium of the council. The idea of a council to assist the reporters was suggested by Lord St. Leonards in the communication which he made to the Bar Committee, and which was afterwards published under his lordship's sanction. The suggestion was, however, rather crude, and the Bar Committee have attempted to give it form and shape by making the council emanate from the Inns of Court, and we think they have also done well in extending it to the attornies and solicitors through the medium of the Incorporated Law Society, thus removing all objection on the ground of exclusiveness. In truth, a proper system of law reporting is of as much importance to the attornies and solicitors as it is to the judges and the Bar. It appears to be an essential element that the council shall act gratuitously, but they are to have the services of a paid secretary who will be required to be an experienced man of business. The question then arises, what will be their duties—will they be active or merely nominal? If active the objection at once suggests itself, that active duties will not be performed properly, at least for a continuance, without adequate remuneration; and the council

it is said, will thus soon become ineffective. If, on the other hand, their duties are to be merely nominal, then, it is said, the council would be a mere *caput mortuum.* We dont think the dilemma is so complete. The duties of the council will not, as we understand the scheme, be active in this sense, that they would interfere with the preparation or publication of the reports. These matters would be left entirely to the responsibility of the editors and reporters—except perhaps that the council might make suggestions to be carried into effect by the editors and reporters for improving the present system, as regards prolixity and a proper selection of the cases to be reported. And it would be the duty of the council also, without necessitating any undue interference with the editors and reporters, so to supervise the whole proceedings as to take care that no inconvenient or unnecessary delay took place in the publication of decisions, and that no arrears should be permitted which with ordinary care and diligence could be avoided. The Council would also have the superintendence and control of the finances, and regulate the distribution between the editors and reporters. Without therefore taking upon themselves the discharge of active duties, the nature of the superintendence and control they would have to exercise would prevent their duties becoming merely nominal. These observations, however, are made only in the spirit which inclines us to hope that the present attempt will have a fair trial, being satisfied that the object is so desirable that if once fairly established with the sanction and support of the profession, any difficulties which may attend its commencement will diminish with its progress, because all the interests essential to its success would be enlisted in its favour.

While we have been penning these observations a case has occurred which strikingly illustrates the working of the present system, and to our mind tends strongly to show the necessity of a change in the direction to which the Bar scheme points, so far as regards reports which are to be citable as authority.

In the *Law Times* of April 1 of the present year the following article appeared:—

"A complaint having been made to the publisher of the *Law Times*, by the publisher of the New Reports, that the judgment of the Lords Justices in *Graham* v. *Wickham* had been copied from them, the complaint was forwarded to our reporter, Mr. Brooksbank, and we have received from him the following explanation. 'The MS. judgment in *Graham* v. *Wickham* was given to me by a friend known as an accomplished reporter and shorthand writer, with liberty to me to make use of it. It was of this I availed myself, and his manuscript itself was sent in to the *Law Times* with but few alterations; indeed, most of the alterations were occasioned by the restoration of some sentences through which the pen had been run, but which were quite legible. Thus I did not even know that I was in any way under obligation to the N. R., but the moment I heard of the complaint, the friend I have referred to, and myself, called together upon the Senior Equity Editor of the N. R., who, with what appeared to us something like a want of courtesy to members of his own profession, declined to hear our explanation. I must be permitted to add that, in the eight years during which I have reported for the *Law Times*, I know that there never has been any gentleman engaged in reporting before the Lords Justices, who would not most cheerfully have placed his notes at the service of any one of his colleagues.' This speaks for itself. We can only express our regret, that Mr. Brooksbank should have relied unduly upon the custom of mutual assistance usually prevailing among the reporters in the same court, and add our apology to his, for any annoyance or injury that may have been thereby caused."

The case of *Graham* v. *Wickham*, referred to in this extract, was a decision of the Lords Justices on appeal pronounced on the 27th of January, 1865, and reported in the New Reports on the 4th day of February following. The case was one of considerable importance, and a very proper subject for a report. The same case was reported a month afterwards in the *Jurist* of the 4th of March last, and in the following week in the *Law Times* of the 11th of March.

The three reports would upon perusal appear to be what they profess and ought to be, the separate and independent reports of the several barristers under whose names they were published, and thereby accredited as authority. We are satisfied that no one reading the three reports, if he had occasion to do so, would from the reports themselves be led to suppose they were other than what they purported to be—the original reports of the barristers under the credit of whose names they are published. It would appear, however, that in truth there is only one original report of the judgment—that contained in the New Reports. The reporter for the *Jurist*, as the publisher of the New Reports alleges, pirated the judgment from the N.R., altering it so as to make it appear his original; and then the reporter of the *Law Times* borrowed the notes of the *Jurist* reporter (not knowing that they were not original) and sent them to the *Law Times*, with, as he says, but few alterations; but, nevertheless, so altered as to make it appear his original. And the *Law Times* reporter seems to think it hard that anybody should think of complaining of what was done so innocently.

The custom alluded to by Mr. Brooksbank, and the resort to which seems to be sanctioned by his employer, has long been known to exist; but we could hardly have expected to have had that custom so plainly confessed, and the judgment of the profession so challenged as to its propriety.

The privilege of the Bar in this matter of reporting is exceptional and peculiar, and very difficult to justify on principle; seeing that the status of a barrister is conferred without any security being given to the public by a previous examination, that the individual is qualified by learning or experience for the duties which, as a barrister, he may be called upon to undertake. The ground of the privilege, however, we conceive to be this, that the public being required to take for granted the barrister's qualification to be a reporter, any report of a legal decision published under his name possesses the guarantee of his professional honour and reputa-

tion, that it is the result of his own personal skill and labour, and that he can as a witness personally testify to its accuracy as regards the facts alleged and proved, the arguments urged, the authorities cited, and the judgment delivered.

The present Lord Chancellor's statement of the privilege is,

"That as soon as a report is published of any case with the name of a barrister annexed to it, the report is accredited and may be cited as an authority before any tribunal."

If, as it seems to be now contended for, a report may be published under the name of a barrister who knows nothing personally of the case, but has merely taken, with or without authority, the contents in whole or in part from a previously published report or the notes of a brother barrister, surely it is high time that some influence were exerted on behalf of the profession and the public, to put a stop to a system of such questionable propriety. Mark, it is the system we denounce, not the individuals who become engaged in it. A barrister who seeks employment as a reporter is remunerated now-a-days with such a miserable pittance for his services that the proprietor cannot expect that he will be personally present in court every day, from its sitting to its rising, as a reporter ought to be; and as long as the publication is so supplied with reports as to keep up circulation, it matters not to the proprietor whether the reports he publishes are begged, borrowed, or how otherwise taken. He has nothing to do with the honour or independence of the Bar; he uses its members as instruments for increasing his trade profits, and the cheaper he can get their services as reporters the better. The profession and the public are only of interest and importance to him so far as he can make a profit by supplying their wants. But the question assumes a very different form when viewed as affecting the profession and the public. As affecting the Bar itself, does not the admitted practice seriously affect its honour, and the hold it has upon the respect and confidence of the public? It is within the memory of living practitioners that the honour and character of the reporter were so pledged to

his personal knowledge of the accuracy of every report published under his name, that whenever the fact was otherwise the report was always published as one *ex relatione*—sometimes the name of the relator being given, sometimes not—and the value of the report, and its weight as an authority, was affected by these circumstances, but the judges and the profession were never misled as to its authorship.

The mutual relations between the reporter and the proprietor nowadays seem to stand thus:—The proprietor may be supposed to say to the reporter, "I want reports for publication in my series. They must be published under the name of a barrister, so that my series may have the commercial value attached to it, which will arise from the reports published in it being citable as authority; and I want also that my series should be complete, that is, that no case should appear in any other series that does not appear also in mine, for reasons that are obvious." The proprietor, should he chance to be a barrister, as has sometimes happened, and may happen again, may be further supposed to say to his reporter, "I know that what I want to have done would, in order to be done in the manner which your privilege as a barrister implies, require your personal attendance in court every day during its sitting, or, at all events, involve the devotion of a large portion, if not the whole, of your time and labour, and that for this you would probably require to be entitled to a liberal remuneration; but you must understand that, as a commercial man in this matter, I have a profit to make, and I must get my labour done as cheaply as I can, and though I am quite aware that what I offer is very far below the real value of your services, you must be content with it, for there are others ready, and who would be glad to take it if you dont. And besides, though I rely upon your privilege as giving the reports their commercial value, entitling them to be cited as authority, I am not a stickler for etiquette or mere propriety, as far as my own interest is concerned—pecuniary interest I mean—and so long as you keep my series supplied with reports, which, being

accredited by your name, will be citable as authority, I shall not inquire whether they are your own original reports or not; so long as they appear to be original, I shall be satisfied; in preparing them you may get what assistance you can, and in whatever way you can; you may beg, or borrow, or take second or third-hand, anyhow, so that you do not actually copy or pirate. If you copy you may create doubt as to originality, and damage the reputation of the series; if you pirate you may expose me to trouble and expense; both these things must be avoided. *Honeste si possis, si non quocunque modo,* except copying and piracy."

What, may we ask, is a report published under the name of a barrister, and thereby accredited as his so as to be citable as authority, which is not his, if it be not a false representation, and a deception practised not only upon the profession and the public, but also upon the judge before whom it is cited as a precedent? Is the deception the less because the advocate who cites it is himself deceived? Just imagine the case of *Graham* v. *Wickham* to be cited from the N. R., the *Jurist*, and the *Law Times*, before a judge, who would consider it as his duty to compare the three reports to see if they substantially agreed, before he accepted the decision as an authority for his guidance, and that judge then to be told that there is only one original, and that the other two are copies more or less disguised! Ought our judges to be exposed to such consequences? What is the remedy? Is it not plainly that which the common sense of the *Law Times* suggested so long ago as 1843, when it asked, "Why should there not be one complete series of reports of cases in all the courts, which should alone be accepted by the judges as authority?" This is the desideratum felt by the public and the profession, and if it cannot be obtained by voluntary co-operation, we hope, for the interest of the Bar, as well as the good of the public, it will ere long be obtained by Government authority. L.

[Note.—We are enabled to state, that since the above pages were in print, the Society of Sergeant's Inn has communicated to the Attorney-

General, through their treasurer, Mr. Serjeant Gaselee, that the Society declines to appoint a member of the Council of Law Reporting without, as in the case of Gray's Inn, expressing any want of confidence in the scheme, much less any disapproval of it. It was quite understood from the views known to be entertained by the judges as to their not desiring to influence the profession either way, that this was the course that would be adopted when the judges met in the present Easter Term. We have good reasons for saying that the statement which has been rather industriously circulated through the press, that all the judges without exception expressed their disapproval of the scheme, is inaccurate. In the month of December last, in a letter from the Lord Chief-Baron to the Attorney-General, officially acknowledging the receipt of the Bar Report, his Lordship writes thus:—"The Report you have done me the honour to send has 'my approval,' and will have 'my support,' as far as I have any to give." "Reporting," adds his Lordship, "has become *a nuisance*; and, like *Sewage*, it has become very difficult to know what to do with it." Vice-Chancellor Wood's opinion in favour of the scheme, at least as a remedy worth trial, is well known, and other judges concur with him. Different judges may, and probably do, entertain different opinions—upon such a subject it is to be expected, nay, it is inevitable, that differences of opinion should exist—some of the present judges are old reporters, and doubtless have their old associations and cherished memories, whose influence may be opposed to change; but to suggest that the judges, as a body, have concurred in condemning, without a trial and without a hearing, a scheme which has emanated from the profession, having for its object the removal of an admitted public and professional evil, and which depends for its success upon the sanction and concurrence of their Lordships, is not only a wrong, savouring of disrespect to them, but is an offence to the intelligence of the profession and the public.]

Art. VII.—CICERO BY FORSYTH.

Life of Marcus Tullius Cicero. *By* William Forsyth, M.A., Q.C., &c. London: John Murray. 1864.

History of Julius Cæsar. Vol. I. London: Cassell, Petter, & Galpin.

The Decline of the Roman Republic. *By* George Long. Vol. I. London: Bell and Daldy. 1864.

IN one of those letters, which are more characteristic of the man than all his speeches and essays, Cicero asks what history is likely to say of him after 600 years. The question may have been put in a spirit of vanity, eager for a flattering

reply; or it may have arisen from the troubled mind so often seen in genius; but one thing at least is certain, that neither Cicero himself, nor the most prophetic of his friends, ever dreamed that when thrice 600 years had passed away his fame would flourish in lands unknown to Roman rule, and that the minutest event of his life would then be a subject of interest to the inhabitants of the distant island scarcely held by his contemporaries to be a portion of the habitable globe. A vanity as insatiable, perhaps, as ever preyed upon a human soul, would have been gratified by the knowledge that the Bar of an empire greater than that of the Cæsars would, at a distance of nearly two thousand years, welcome a new biography of Cicero, chiefly because it gave them a more familiar and domestic view of the man whose faults and foibles cannot obscure his genius, nor destroy the real estimate of his character.

In some respects the legal profession of England ought to be peculiarly fitted to form an estimate of the Roman Bar, and therefore of the merits of the great orator who will be its most brilliant representative to all time It is true that there are wide differences between Roman and English law, and in the positions of Roman and English lawyers; but there are also points of close resemblance. Both systems of jurisprudence grew out of custom, and would resort to a fiction rather than acknowledge a change; both borrowed largely from other nations; both heaped up through generations of practitioners a heterogeneous mass of precedents; both were strengthened by constitutional conflicts, and burdened with exceptional legislation; both were at once the defence and scourge of the people, the bugbear of the litigant and the backbone of freedom. The Roman lawyer was, as a rule, much more of the orator and the statesman than is the English barrister; but we doubt whether he was so much of the jurist, and he was not more imbued with legal or constitutional principle, nor was he (though generally wealthier and better born) more independent in his professional character. The

Bar of England, like that of Rome, has always taken a large share in legislation, and has made its voice potent in the senate as well as the forum. It is not, indeed, singular in the possession of the great qualities necessary for such a position; we will not commit the professional egotism of saying that it is even pre-eminent; but it has, at least, so far vied with the advocacy of the ancient republic as to enable it to sympathise in the most intimate way with the career of a Roman lawyer. Mr. Forsyth has, therefore, addressed a favourable audience, and has met with an applause which is, on the whole, merited, though it has not always been very discerning in its character.

The strength of these two volumes lies in the pleasant gossipy fashion with which they bring Cicero before the minds of their readers. They tell us about his villa, his library, his private tastes, his domestic relations; notably those with his wife Terentia, whom Mr. Forsyth gallantly defends, and who may possibly have been used ill in being discarded for a younger rival, but whose tongue we nevertheless suspect was as long as her husband's, though exercised after a different fashion. They also narrate his friendships and colloquialisms, retail his jests, not always first-rate, and describe, though with a sparing hand, his vanity and other weaknesses. Such things are all-important in biography, because they enable us to understand that everyday life of a man which elucidates his character much more than his conduct in a few rare emergencies, and they are not the least valuable of materials for history, inasmuch as they lay open the secret springs of public effort, and guide us to a divination of individual motive and exertion. But this after all is but one part of the work that has to be achieved in writing the life of such a man as Cicero; and while we readily acknowledge the success of Mr. Forsyth in this particular, we cannot think that he has compassed, in any degree adequate to the subject, the higher and more comprehensive aims which should distinguish the biography of one, not only himself orator, statesman, philosopher and jurist (for

all this he might have been elsewhere), but also a leading character in the most famous of states at the most stirring period of its political history. We cannot discover in these volumes any real insight into the philosophy of Roman history, or any just scrutiny of the vast forces which in Cicero's time were transmuting the Roman Commonwealth. We miss in a great measure those elucidations of Roman law which may fairly be looked for in a biography of a Roman jurist; and we must condemn as wholly misplaced and mistaken, the occasional attempts to illustrate modern politics by the events and legislation of an age with which the England of our day has so little in common. We think that a great deal may be learned of the character of Cicero from the pages we are criticising, and this, in itself, is no small praise; but we also think that a great opportunity has been lost of doing real justice to his public life, whether in politics or in literature, and that no justice has been done at all to the need of the reader for a masterly sketch of the judicial and legislative history of Rome at the momentous epoch adorned by the intellect of Cicero. In short, taking the statement of Mr. Forsyth in his preface, that his object "has been to exhibit Cicero, not only as an orator and a politician, but as he was in private life, surrounded by his family and friends," we cannot help saying, that while he has succeeded in the second and less important part of this undertaking, he has failed to a considerable degree in the first and higher branch of the work. The portrait he has drawn is something in the nature of a photograph; it is great in details; it gives every crease in the coat and every curl in the hair; it enables you to identify the man; but the breathing soul is scarcely present in the picture, and the stirring realities of life are represented in a pillar and curtain, with a fancy landscape in the background. Yet a photograph, especially in the absence of a better likeness, is always acceptable; the one lying before us has been carefully and even lovingly executed; and it would be both unjust and ungrateful if we failed to say that we rose from our perusal of

Mr. Forsyth's work with a clearer insight into Cicero's conduct and character than we ever before possessed, and with an affection (none the colder because somewhat savouring of pity) which we had not felt till then for the destroyer of Catiline and the victim of Antony. In the following pages we shall endeavour to bring before our readers some of the salient points in Cicero's life, and in the condition of Rome at that period, and in doing so we must be understood as availing ourselves of the useful labours of Mr. Forsyth, as well as of the work recently published by the Emperor of the French, and that on the Roman Republic by Mr. George Long.

In a rustic spot on the Volscian hills, and near the town of Arpinum, Cicero was born, B.C. 106. His family was plebeian but respectable, and had some undetermined claims to ancient lineage;* but what was far more valuable to the future orator, he had by birth, as an inhabitant of Arpinum, the full rights of Roman citizenship. He was educated, with his younger brother Quintus, at Rome, devoting himself chiefly to the study of the Greek language and literature, which had then become fashionable. He wrote some tolerable verses when young, but had the sense in maturer years to acknowledge that he was no poet; he also early commenced that pursuit of mental philosophy which was destined to soothe many bitter hours and to compose his mind in the last moments of his life; but from the time when he assumed the *toga virilis*, his engrossing pursuits were those of law and rhetoric, and his consuming passion became the desire of distinction in oratory. The way in which he prepared himself for his future career is well described by Mr. Forsyth in a passage which we make no apology for transcribing at length.

"The contrast between ancient and modern manners is so great that it is very difficult to realise it, and bring clearly before the

* Cicero was above any pretence of aristocratic descent. When urged, as a young man, to change his homely appellation, he had the greatness to reply that he would make it more glorious than the names of the Scauri and the Catuli.

mind's eye the usages of social life that belong to a remote antiquity. Law was taught in a very different manner in republican Rome from that to which we are accustomed in England. There were no chambers of pleaders and conveyancers to which the young student might resort to copy precedents and answer cases, having first obtained admission there by the payment of an *honorarium*. Nor were there, so far as we know, public lectures on law like those of our inns of court, open to those who might choose to attend them. And yet there was a practice at Rome which bore a certain analogy to both these methods of instruction, and to a certain extent combined the advantages of both. It was this: those who aspired to fill the great offices of State knew that they could only climb the ladder of ambition by the suffrages of their fellow citizens. The object, therefore, of every public man was to cultivate popularity, and there were two modes of cultivating it with success, both of which, however, might be, and sometimes were, combined. The one was by undertaking gratuitously the defence of the accused, and advocating causes in courts of justice; the other by giving gratuitous advice on points of law to those who required their assistance. For this purpose the house of a Roman juris-consult was always open, not only to suitors but to students who came there to listen to the *responsa prudentum*, or legal opinions; which were delivered, not in the stiff formal manner of a modern consultation, but in the easy mode of familiar conversation, sometimes during a walk in the *peristylium* of the house, and sometimes during a saunter in the Forum. It was thus that Cicero attached himself to Scævola the Augur as a kind of pupil; and that so assiduously that in his own emphatic language he declares that he hardly ever quitted his side. He used to take notes of his lectures, and commit his maxims and sayings to memory; following him to the courts when he pleaded as an advocate, and to the rostra when he harangued the people. He thus received practical lessons in eloquence and law, and formed himself for the career which he had marked out for himself, and in which he was destined to acquire such deathless fame. After the death of this great lawyer he transferred himself to another of the same family and name, for he too was called Quintus Mucius Scævola, and was the cousin of the Augur who had filled the office of Consul, and was Pontifex Maximus. He was the first who attempted to

give a scientific form, to the *Jus Civile*, by writing a systematic treatise upon it; and Cicero with grateful enthusiasm calls him the most eloquent of lawyers and the most learned of orators. His time was now incessantly occupied. He lost no opportunity of attending the speeches of the different orators and pleaders in the Forum and the courts; he watched the gestures of the best actors, like Æsop and Roscius; and every day was spent in reading and practising declamation. Philosophy and oratory seem to have been the two chief objects of his study; but if of any man before Bacon appeared that might be said which the great master of modern philosophy claimed for himself, that he had 'taken all knowledge for his province,' it might be truly declared of the youthful Cicero."

Thus prepared, he was, as we say, called to the Bar, and held his first brief when he was about five-and-twenty years of age. It may be worth while to consider what was the state of Rome at the time.

The Emperor of the French has very truly pointed out that Roman society was founded upon respect for family, for religion, and for property; that Roman government was founded upon election; and that Roman policy was founded upon conquest. It will be observed, that at the period we are now considering, all these elements of the national greatness were more or less in process of dissolution. Duty in the various relations of life had been the guiding star of the old Roman; duty towards the domestic hearth, which had made divorces unknown for a considerable period, and had placed the Roman wife and mother in a moral position unsurpassed in history; duty towards the law, as established by authority and sanctioned by religion; duty as a citizen, demanding public self-sacrifice and exertion, while in civil and military life, and that respect for the rights of others which he was ready to enforce for his own. But duty had by this time lost its supremacy, and the various passions of the human soul were exercising an almost unbridled sway over society. The Roman ladies had not yet sunk to the turpitude ascribed to them by Juvenal, but they had begun to exhibit a laxity of manners,

and a disregard for the obligations of the marriage tie, which are the sure signs of social disorganisation. Respect for the law or the constitution could hardly be expected in a generation which had seen the one habitually violated by every political party, and the other overthrown by military force. Armed factions had fought in the streets of Rome; popular statesmen had been openly murdered when their measures could not otherwise be defeated by the senate; massacre and confiscation had been the lot of the defeated party as each side alternately conquered success. Security for individual life and property, the sheet-anchor of all social and political institutions, had been greatly shaken; the nobility dreaded the agarrian legislation which aimed at redressing the original injustice of their usupation of the public land, but at the cost of much personal hardship; the partisans of democracy feared the unscrupulous hatred of the dominant faction, the dominant faction feared some wild outburst and bloody retribution, the peaceable citizens perhaps feared equally the violence of both parties, and knew that in any crisis the law would be powerless to protect them. The electoral system, when not disgraced by contests of brute force, had sunk into a regular traffic for votes, so notorious that the agents who purchased the suffrages, and those who held the money, were recognised professions, and are continually alluded to as such by Cicero in his orations. The nobility had degenerated from their ancient efficiency in the service of the State, and for the most part preferred the pursuits of luxury to those of public life. Society, deprived of the natural leaders who are the bulwarks of order in a free commonwealth, was cowed by audacious adventurers, or cajoled by brazen demagogues. Nor beyond the city itself, was there anything to reassure a prescient statesman. Italy had been devastated by a civil war, waged for the purpose, equally foolish and unjust, of denying to the allies the rights of Roman citizenship, and the contest had ended with the nominal triumph of Rome, but the real concession to the vanquished of the privileges they had

asked. Slavery, too, had produced its natural and inevitable fruits; the class of free labourers had in the main disappeared, and a population of discontented bondsmen, yielding those wasteful services which alone can be won by coercion, had made the land unfruitful and perpetuated the danger of desperate revolt. Even abroad the policy of conquest was beginning to fail in its relief for home troubles; the Roman arms had suffered more than one eclipse; the Mediterranean swarmed with pirates; the north was ominous of some fresh inroad which no Marius remained to quell; already it was known that the legions were no longer necessarily patriot, and that every rising commander was a possible master of the republic. Sylla had of late years maintained a superficial security, by quenching opposition in blood, and by restoring in a great degree the aristocratic character of the government; but Sylla was now passing away, and the principles to which he had been opposed, indestructible, because springing logically from the force of events and the needs of the people, were sure to reassert themselves, and to come into violent collision with the party in possession of power.

Politicians at Rome were at this time divided into two distinct sections; those who opposed every change—fearing, as the Emperor says, that the moving of a single stone might shatter the whole edifice—and those who advocated such a change as would at once widen and consolidate the institutions of the State. Looking back from this distance of time, with the full light of subsequent history poured upon the crisis, it is easy to see which policy was the wiser, or which, at any rate, was the more certain to succeed. It is curious that the Roman constitution should have shown so little elasticity, inasmuch as the people themselves were singularly receptive of new ideas, and both their law and their literature borrowed largely and constantly from foreign sources. Indeed, it was the cosmopolitan tendencies of the Roman ever assimilating to himself the worship, and legislation, and arts of other nations, which have given to Roman jurisprudence

its permanent value, as a vast storehouse of custom, precedent, and law. But the constitution of Rome had no such qualities of adaptation; its essential spirit remained identical through all the generations that witnessed the expansion of Roman dominion; it was still the municipal government of a city, though that city had grown to be the mistress of the world. The struggle to remove this huge anomaly, and to make the state Italian at least in its character, was the great political movement in Cicero's day, and one can hardly imagine that his intellect overlooked the nature and importance of the question. Yet Cicero throughout his life remained firmly attached to the party which opposed all constitutional improvement, and which by that means necessitated a revolutionary change; and he did so, as far as we are able to judge, with an honest, though blind, conviction that he was acting for the good of his country, yet with a clear insight into the folly and weakness of most of his political associates. It might have been imagined that his birth and predilections would have led him to espouse the cause of the people, did we not so often see the ambitious *parvenu* eager to ally himself with rank, and did we not fully comprehend the strong motives which must have acted on Cicero at the commencement of his career. As a "new man" his chief ambition was naturally to reach those public offices which, under the excellent administrative system of Rome, conferred nobility by service; and in his younger days, at any rate, he was much more likely to attain his object by joining the obstructive party. The senate had need of able adherents, and the aristocracy were willing, or at any rate were under the urgent necessity, to employ any man of first rate talent, who would help them to make head against popular inroads. But what were the motives which in after days kept Cicero to the losing side, and deprived the popular party of his invaluable help? His rare ability as an orator had made him sufficiently influential to place him above the need of faction; the offices

which he successively filled, won, we may say, with a good deal of tact as well as talent, had proved his administrative capacity, and had finally given him a position unsurpassed by any mere civil politician. He was thoughtful, independent, incorrupt, and though neither he nor any man could have changed materially the course of events at Rome, yet he could have modified them considerably. He might possibly have made the revolution bloodless, and he would almost certainly have influenced its direction by allying himself, on terms, with Cæsar. What were the forces, we repeat, which drove his mind in the opposite direction?

We believe that, as is generally the case in human action on important matters, the motives which swayed Cicero politically were complex. A tinge of genuine conservatism in his character (though practically he abhorred abuses, and was always ready for useful administrative reforms) may probably account for much; his singular and restless vanity may explain more. It was so delightful to be flattered by the old families, to be always recounting to the proudest assembly in the world his own marvellous exploits as the saviour of his country, to be looked up to as the chief adviser, and to be in many ways the real leader, of the great aristocracy of Rome. He felt, moreover, that in any new organisation of the government he could only occupy at best the second place, and with a long interval between him and the incomparable representative of the Marian party. But most of all, we suspect that the fatal blemish in his character, the timid vacillation which beset him, was at the root of his unhappy adherence to Pompey. It always requires decision of no ordinary kind to enable a politician to break through traditionary opinions, to shape a new course for himself, and believe in a new future for his country, when he has reached the midst of his public career. Few men have possessed the resolution necessary for such a step; and Cicero, of all men, was least likely to exhibit the quality. He had rare energy of mind, but it was of the febrile, excitable type, capable of great exertion (as he more

than once showed) at a critical moment, but deficient in the solid and masculine courage which made the stuff of the old Roman as it does of the modern Englishman. At times, as we know from his letters, he debated whether he should not leave a sinking ship, and leave it for his country's sake as well as his own; but he always halted, and hesitated, and wavered, and as the inevitable result, resolved to remain as he was. It was this weakness of purpose which precluded his reaching the fame he might otherwise have commanded, as it forms an irremovable obstacle to the highest estimate of his mind. Victor Hugo, in his characteristic essay on Shakspere, after enumerating the few first rate geniuses known to history, gives a list of celebrated men who deserve to be ranked in the second class of human intellect. In this class the brilliant Frenchman places Cicero, and, we think, for the reason given above, with justice. It was not only that he lacked that imaginative greatness which made Homer and Shakspere masters of the mind to all ages; for if he comes after these one or two giants of intellect, he yields to none other. Cicero had in a degree never surpassed the rare comprehensiveness of mental range which is found only with a brain at once powerful and fertile. He was not only an orator unsurpassed in history, full of that quality which Demosthenes described as everything in a rhetorician, but, as we have before observed, he was also a statesman, a jurist, and a philosopher; in unequal proportions, no doubt, but all in a high degree. He possessed excellent abilities for administration, and, during his command in Cilicia, he performed with success one of the most difficult of military operations, a campaign in mountain warfare. Had he lacked the power of declamation, his literary capacity would have secured fame, and though posterity thinks only of his prose writings, it is certain that he had, like Burke, the germ at least of a poet in his composition. His personal character, especially considering the times in which he lived, was in many respects as lofty as his intellect. He was moral in a

profligate age; upright in the midst of corruption; a disinterested, though, in our view, a mistaken patriot, in a political society selfish and anarchical to the core. Yet, with many brilliant and many noble gifts, one thing he lacked. Firmness of character would have made him, what he never was, powerful and truly prescient as a politician; but, wanting that great faculty, he drifted to destruction, and Rome made shipwreck with him.

We, of course, have not space here to follow Cicero through the various events of his professional and political career, but we cannot pass without notice his famous prosecution of Verres. The account given by Mr. Forsyth of this trial, is a good specimen both of the merits and the deficiencies of his work. The conduct of Verres, during his government of Sicily, is briefly but pointedly described; full justice is done to the energy displayed by Cicero in getting up the evidence and forcing on the trial; and an idea, sufficiently vivid, is given of the nature of the proceedings. But not a word is said as to the peculiar legislation under which the prosecution was instituted, nor of the motives which led to its enactment; and yet this is not merely important in relation to Roman history, but is valuable as a fragment of comparative jurisprudence in connection with the system of impeachment in our own law. England is one of the few countries which, like ancient Rome, employs a number of public servants as governors of distant provinces; and it must, consequently, be a matter of interest to us to understand thoroughly the legislation by which Rome sought to control the conduct of such officials. Now it appears that, till the year 149, B.C., there were three modes of obtaining justice against a Roman magistrate who had misconducted himself in the administration of a province, but none of these modes were effectual. The senate could examine into the matter, or it could appoint a special commission to do so, or the offender might be impeached before the people by the tribunes. In the last case only could punishment be inflicted in addition to compelling the guilty person to make restitution;

and such impeachments were rare and not always as successful as they should have been. The senate was full of business, and it was composed of men who would naturally sympathise with ex-governors. But, in the year above mentioned, a law was passed by Calpurnius Piso for the establishment of a separate court for the trial of such offences, under the name of *Quæstio perpetua de pecuniis repetundis.* The court consisted of a presiding judge, who was a prætor, and of a body of judices or jurymen, annually appointed. Under the Calpurnian law these judices were senators, but subsequently the knights were chosen in their place. This tribunal, whose powers were enlarged by successive acts, seems to have worked well, and it ought to be a question whether the cumbrous and unsatisfactory process of impeachment among ourselves should not be superseded by some special court of high authority, possibly the Judicial Committee of the Privy Council.

Certainly no legislation could be thrown away which had for its object to protect Roman provincials from the abuse of administrative power. We doubt whether any class of officials have in any age produced so large a proportion of men faithless to their trust, as have the Roman governors. The Roman looked on the world as his heritage, and on a conquered province as his prey, and a governor was simply a Roman in a position to carry out to the letter this dominant idea. But of all the governors whose misdeeds have been recorded by history, Verres stands out as the type of the sordid, insatiable, nefarious tyrant. During three years he had made the inhabitants of Sicily the victims of his cruelty, rapacity, and lust; sparing neither sex nor age, neither the dwellings of men nor the temples of the gods; preying alike on the public revenue and on private property. Yet this man, whose deeds were notorious to thousands, who had gone the length of crucifying Roman citizens, and who was accused and prosecuted by a deputation from the whole island, believed and boasted that his wealth and influence would

procure him an acquittal at the hands of the judices.* The boast might not improbably have been verified under the ordinary circumstances of a criminal prosecution; but neither Verres nor his friends had estimated at their due worth the vigour and genius of Cicero. It was the great case of his life—a greater has never been entrusted to an advocate—and he proved himself equal to the occasion. There can be little doubt that his exertions were the genuine offspring of his character, and not merely the discharge of conscientious duty as an advocate, far less the mere purchased services of a practitioner. His whole soul was in the work. He himself showed in Sicily and Cilicia that a Roman official could be righteous and merciful, just to man and honourable to woman; and throughout his life he burned with a noble indignation against corruption and cruelty. He was now thirty-seven years of age, in the possession of large practice, commanding considerable influence, as his election to the curule ædileship had just shown, and in the zenith of his oratorical powers. Against such a man, lighted up with such a fire, all the arts of Verres availed nothing. In vain he bribed and threatened; in vain the Metelli and the Scipios exerted themselves in his favour; in vain he endeavoured to evade justice by attempting a sham prosecu-

* "From the foot of Mount Taurus, from the shores of the Black Sea, from many cities of the Grecian mainland, from many islands of the Ægean, from every city or market-town of Sicily, deputations thronged to Rome. In the porticoes, and on the steps of the temple, in the area of the Forum, in the colonnades that surrounded it, on the house-tops, and on the overlooking declivities, were stationed dense and large crowds of impoverished heirs and their guardians, bankrupt publicans and corn-merchants, fathers bewailing their children carried off to the prætor's harem, children mourning for their parents dead in the prætor's dungeons, Greek nobles whose descent was traced to Cecrops or Eurysthenes, or to the great Ionian and Minyan houses, and Phœnicians whose ancestors had been priests of the Tyrian Melcarth, or claimed kindred with the Zidonian Jah, 'all these and more came flocking,' and the casual multitude was swelled by thousands of spectators from Italy, partly attracted by the approaching games, and partly by curiosity to behold a criminal who had scourged and crucified Roman citizens, who had respected neither local nor national services, and who boasted that wealth could yet rescue the murderer, the violator, and the temple-robber from the hand of man, and from the Nemesis of the gods." (Smith's "Greek and Roman Biography." Art. Verres.)

tion. In the famous speech *De Divinatione*, a masterpiece of sarcasm and incisive argument, Cicero defeated the attempt at collusion, and then applied himself to collect such evidence as should settle the case. He went to Sicily himself, and worked with such rare energy, that in fifty days (less than one half the time allotted to him by the court) he was ready to open the impeachment. Then came a struggle by the defendant for delay, and then came from Cicero the strongest proof which his nature was capable of giving of his thorough earnestness in the cause. Though he had carefully prepared the magnificent oration which still lives as the monument of his forensic genius, he resolved to suppress it in delivery, and to grapple with Verres by merely speaking a short introduction to the facts, and then calling his witnesses at once. Even that brief effort shines with the splendour of his intellect, like some small sketch from the hands of a mighty painter. This self-sacrificing policy (for his vanity must have suffered sore) reaped its quick reward. On the third day of the trial Verres fled from Rome, was found guilty, and was condemned to banishment and a heavy fine. Looking to the influences at work, and the notorious corruption of the class from whom the judices were taken, no more signal triumph was ever obtained by an advocate, and no case ever did more honour to the public zeal and incorruptible fidelity of a man.

Cicero passed regularly through the various offices that constituted the ladder of civic ambition, and he boasted that he held each as soon as he had reached the legal age for candidature. His accession to the consulship, not a little through the influence of his friend Atticus, at once sealed his adhesion to the oligarchical party, and brought on the political crisis of his life. We perceive that Mr. Forsyth adopts the current estimate of the character and aims of Catiline, regarding him as a creature of abnormal iniquity, bent for some mysterious end on the destruction of his country and the ruin of his order. Catiline was, beyond all question, an unscrupulous, violent man, who would probably have pursued

the best objects by irregular means, and whose private life was rather more stained with profligacy than even the average of the Roman nobles of his day.* But we believe that the French Emperor takes the correct view in rejecting the idea that Catiline meant to fire the city, and in regarding his conspiracy as framed for the same political purpose that animated the long struggle of the Marian party. However this may be, it is certain that Cicero and the senate acting under his influence unwisely strained their powers, and exhibited a rancorous injustice against the conspirators. Cicero may have been actuated by a desire to secure his position with the oligarchy, by crushing their worst enemy at one terrible stroke; if so, his conduct, though admitting of palliation, would deserve severe blame; but we are more inclined to think that he was worked on by his highly nervous temperament, and that the public danger which existed at the moment, coupled with the attempts at his own assassination, carried him, as is the case with naturally timid men, into extremes which a more masculine character would have avoided. There is nothing so unprincipled as fear, and Cicero not only was in a state of dread himself, but communicated the contagion to all around him. Nevertheless it was that kind of fear which did not obscure his ability nor cramp his energies, but rather roused him into an extraordinary display of both. His speeches against Catiline will live to all time, as samples of fiery invective; and once admitting the lawfulness of his policy, it is impossible not to admire the adroitness with which he baffled the conspirators. Having driven Catiline from Rome by the mere force of his harangues, and having fixed Lentulus and his colleagues with their guilt through the evidence of the Gaulish ambassadors, Cicero proceeded to induce the senate to pass a sentence of death—utterly illegal—on the prisoners. But the sentence was not only illegal as made by a body which had not the power of capital punishment in its hands, it was also

* Most of them, for instance, were contented with unlimited adultery. Catiline, if we are to credit Sallust, had compassed the rarer guilt of seducing a vestal virgin.

immoral, because unfounded on any regular trial, and arrived at without hearing the accused in their own defence. Cæsar showed at once his commanding character and his prescience of future events, by boldly pleading in the senate for mercy; he may possibly have sympathised in the conspiracy, though we do not for a moment credit the suspicion which connected him with Catiline; but it is impossible to read his statesman-like and philosophical appeal, equally unmoved by the excitement around, and his own imminent danger, without feeling his superiority to the orator who thundered for blood. All the success which Cicero achieved on the occasion, all the adulation which was heaped on the "father of his country," failed to secure him the steadfast adherence even of his own party, and brought him finally humiliation and exile.

The immediate agent of Cicero's temporary ruin was one whom he would probably have despised as impotent against him in any civil strife. The chief cause of the enmity of Clodius was in a curious matter, which throws much light on Roman society at the time, and is one of many instances to show the small points on which a sequence of important events may apparently hang. Cæsar, whose notorious passion for women is dwelt on by his imperial biographer as a proof of his innocence in respect to a grosser accusation, found himself at last in the position which he had caused so many other husbands to undergo.* His second wife, Pompeia, had become the object of desire to Clodius, probably the most audacious

* The Emperor gives a list of the highborn ladies who yielded to the seductions of Cæsar, and alludes to the belief that he was a good deal guided in his intrigues by political motives. On one occasion, however, he was brought into great danger by one of these intimacies. Cæsar was strongly suspected of being implicated in the Catiline conspiracy, and during the debate in the Senate on that occasion, it was observed that a letter was handed to him somewhat secretly. Under the idea of detecting a treasonable correspondence, a loud cry of Read! Read! was directed at him. It was really a love-letter from Servilia (sister of Cato and mother of Brutus) and Cæsar was put in this awkward position, that he must either conceal the letter, and thus clench the belief in his guilt, or read it and betray Servilia to her husband. With characteristic presence of mind he handed the letter to Cato, confident that a brother would not proclaim his sister's dishonour. Cato glanced at the contents, and flung it back in a rage, with the exclamation, "Take it, drunkard!"

profligate in Rome, and the lady, no reasonable person can doubt, was willing to gratify her admirer. But Pompeia had, in Cæsar's mother, Aurelia, a guardian so vigilant that the lovers found it impossible to meet, and Clodius was for some time driven to his wits' end for an opportunity. It happened however, that the mysterious rites of the *Bona Dea* were to be celebrated in Cæsar's house, as he then held the office of Chief Pontiff; no man was ever admitted on the occasion, when the noblest matrons of Rome, assisted by the vestal virgins, performed ceremonies, phallic or other, on which no profane eyes might look. Clodius conceived the idea of disguising himself in female dress, making his way into this secret assembly, and thus gaining access to Pompeia. The plan succeeded so far that he obtained entrance into the house, but was there recognised by a slave, and ignominiously ejected on the discovery. The scandal next morning was prodigious; the vestal virgins, as became such sacred maids, professed themselves grievously outraged; the matrons of the best families in Rome demanded vengeance; the college of augurs took up the matter; and the senate, either really impressed with the impiety of the deed, or influenced by the excitement around, formally voted the public prosecution of Clodius. Cæsar promptly divorced his wife, without condescending to inquire further; and it was supposed that there could be but one end to the matter. However, when the day of trial arrived, out of the many eye-witnesses to the fact, only Aurelia presented herself before the judices; her evidence was clear and distinct, and she deposed to the previous intrigues of the lover to gain an interview with Pompeia. Clodius relied on an *alibi*, pleading that on the day, or rather night, in question, he was at a considerable distance from Rome. Cicero on this occasion acted in accordance with his character; he had little to gain by the condemnation of the accused, he had something to dread from the revenge of a dissolute and desperate man; but Cicero had a deep regard both for religion and morality, and though we can hardly suppose him to have been one of those who could look in the face

of a brother augur on all occasions with an entirely solemn countenance, he always endeavoured to maintain the sanctity of the national worship. He voluntarily presented himself as a witness, and swore that on the afternoon of the day when the rites of the *Bona Dea** had been celebrated, he had met and recognised Clodius in the streets of Rome. It might have been imagined that such evidence would be decisive; but Clodius did not vainly rely on his friends. The judices were as a body notoriously corrupt, and Crassus bribed heavily in his favour. Cæsar when called into the box declared that he knew nothing of the matter, and being pressed in cross-examination, why, then, did he divorce his wife, gave the famous reply, that the wife of Cæsar must be not only above guilt, but above suspicion. The populace took the side of Clodius, perhaps because he belonged to the democratic party, perhaps because they thought the pursuit of a pretty woman was not an offence demanding condign punishment. The result was that the reprobate was acquitted, and that he thenceforth resolved to have revenge on Cicero. It was he who worked up the popular feeling against the ex-consul on the ground that he had put to death Roman citizens without a trial; and it was he who finally succeeded in obtaining the enactment of the measure which banished Cicero from Rome.

His exile was in every way the heaviest calamity that befel Cicero during his life. Not only did it shatter his political position, and inflict acute suffering on his sensitive mind, but it was the means of exhibiting his character to posterity in all its naked weakness. Up to this period of his career he had shown himself vacillating and vain; it is only now we realise that he could be contemptible and abject. His unmanly com-

* Cicero jested on the name of the deity, saying that she was indeed "a good goddess" to Clodius, as she had allowed him to escape unharmed after the outrage of her sanctity. It happened, however, that when Clodius was murdered some years afterwards, he fell close to a temple or shrine of the *Bona Dea;* a circumstance which greatly edified the "religious party" in Rome, as demonstrating the existence and intervention of the goddess.

plaints, his miserable restlessness, his utter want of dignity and self-reliance, when deprived of the daily ministrations to his egotism which Roman society and the business of the Forum had supplied, sink him to a point in our estimation, at which it is only merciful to turn the face away from the prostration of a brilliant mind. But from this time forward, with the brief exception of his triumphal return, there is little other than melancholy in the history of Cicero As the political complications of Rome thickened around him, his vacillation grew greater, and the falsity of his position became more apparent; until it might almost be said of him that his hopes and wishes were on one side of the conflict, and his fears and convictions on the other; until he felt nothing but contempt for the imbecility of his friends, and a dread certainty of the success of his foes. Domestic calamity, too, wrung a heart that had always been quick and tender in its affections, and the premature old age of anxious sorrow found him childless * and wifeless in the midst of a defeated party and a desolated land. There is something exquisitely pathetic in his lamentations for his daughter Tullia, to whom he had looked for solace in his declining years.

Yet it was to this part of his life that we chiefly owe the immortal treatises, beaming with elegant thought and pure Latinity, in which Cicero has embodied his meditations. They are in a great measure the reflection of those studies in Greek philosophy and literature, to which from his earliest years he had been closely addicted. During his questorship in Sicily it was his lot, by a curious chance, to discover the lost tomb of Archimedes, and he did not gaze on the relics of the illustrious geometrician with more admiring interest than he felt for the productions of the poets and sages of Athens.† It might have been well for him had

* Of course we do not use the word literally. Cicero's son survived him, and obtained promotion under Augustus; but he was absent from Italy during the latter part of his father's life.

† "So Tully paused, amid the wrecks of Time,
On the rude stone to trace the truth sublime,
Where at his feet, in honoured dust disclosed,
The immortal sage of Syracuse reposed;

he devoted his old age wholly to his villa and his books, and have left the factions which burst into conflict on the death of Cæsar to settle their differences without his aid. But this was not to be. Pouring out upon Antony the full vials of his bitterness in an oratory which had always dealt somewhat too much in exaggerated invective and sarcasm, and which now raged with acrimonious and even scurrilous abuse, Cicero reaped the undying hatred of a worthless and vindictive man. Abandoned by those who were bound in honour to protect him, he fell a victim to the assassins of Antony close to his own Formian villa. It is just to say that perhaps nothing in his life became him like its ending. At that supreme moment vacillation and timidity seemed to drop like cast-off garments from his character, and he met his fate with calm courage, as if conscious that he was guileless before gods and men, faithful to his country, and true to a failing cause, with no baseness, either of corruption or of treachery, to reproach his dying hour. For such, with all his faults, was Cicero, and the posterity which has inherited the fruits of his genius, has in every generation done justice to his fame.

A biography entirely worthy of his career, and embracing the totality of his intellect, still remains to be written. But whatever criticism we may have felt it our duty to pass on what appear to us the shortcomings of the volumes before us, we desire in parting with the subject to bear witness to the admirable scholarship no less than the rare industry exhibited by Mr. Forsyth in their compilation. We can well understand that the work has been to him a labour of love, and we sincerely congratulate him on the reward he has already reaped in the favourable judgment both of the profession and the literary public.

> And as he long in sweet delusion hung,
> Where once a Plato taught, a Pindar sung,
> Who now but meets him musing as he roves
> His ruined Tusculun's romantic groves,
> In Rome's great forum who but hears him roll
> His moral thunders o'er the subject soul."—*Pleasures of Memory.*

ART. VIII.—ON CRIMINAL RESPONSIBILITY.

CRIMINAL responsibility has been a *quæstio vexata* for many years, more especially since the trial of Daniel McNaughten, who shot Mr. Edward Drummond (Private Secretary to the then Prime Minister, Sir Robert Peel), on January 20, 1843. The question is of great and vital importance, whether it be regarded in a medico-legal point of view, or as affecting the security and welfare of the community. It has always been our opinion that the verdict in McNaughten's case according to the evidence adduced at the trial was correct; although there have been, and still are, men of eminence who maintain that the circumstances showed such a thorough adaptation of means to an end, and such a power of control over his actions, on the part of McNaughten, that he ought not to have been acquitted on the ground of irresponsibility. Being one of the leading cases on the subject of mental competency, a short review of the facts may not be out of place. McNaughten imagined that he heard voices speaking to and of him, and believed himself to be the victim of persecutions of such a kind, as to have made his life intolerable; and further that they were carried on by members of the Government. He therefore, with the view of ridding himself of these persecutions, conceived the idea of assassinating the Prime Minister. To effect his purpose, he went from Glasgow to London, and after lying in wait for many days in the neighbourhood of the Government offices for his victim, ultimately shot the wrong man in open day, and in one of the most frequented thoroughfares. So far as we remember, he made no concealment of his act, although since his confinement we understand no one has ever been able to induce him to speak on the subject, and nothing is known positively, therefore, whether he believed that in shooting Mr. Drummond he was shooting the Prime Minister, or a member of Government.

Public indignation was at the time very strongly expressed on account of the verdict of "Not Guilty, on the ground of insanity," returned by the jury; partly because of the atrocious nature of the homicide, and partly because the court permitted medical men, who had known nothing of him previously, to be examined on behalf of the prisoner, and whose opinions were based exclusively upon the evidence given by the witnesses during the progress of the trial. The same matter was afterwards discussed in the House of Lords* and at the suggestion of the then Lord Chancellor Lyndhurst, the following series of questions† were submitted to Her Majesty's judges for the guidance of their Lordships.

"1. What is the law respecting alleged crimes committed by persons afflicted with insane delusions in respect of one or more particular subjects or persons? As, for instance, when, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusions, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

"2. What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusions respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

"3. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

"4. If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?

"5. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the prisoner's state of mind at

* Hansard's Debates, Vol. LXVII., pp. 288-417.
† Clark and Finnelly's Reports, Vol. X. pp. 200. 1845.

the time of the commission of the alleged crime, or his opinion, whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any, and what, delusion at the time ?"

Lord Chief-Justice Tindal, in delivering the opinion of all the judges (except that of Mr. Justice Maule, who gave his separately), said, Her Majesty's judges—

"Deem it at once impracticable, and at the same time dangerous to the administration of justice if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your lordship's questions.

"They have, therefore, confined their answers to the statement of that which they hold to be the law upon the abstract questions proposed. Their unanimous opinion is :—

"1. That notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law."

The second and third questions were answered together.

"The jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction ; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing ; or, if he did know it, that he did not know that he was doing what was wrong. . . . . If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable ; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong.

"4. The answer must of course depend on the nature of the delusion.

"If he labours under partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility, as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of taking away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

In answer to the last question:—

"We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

With the greatest deference to this weighty opinion, it appears to us that the first, and the greater portion of the second, third, and fourth answers of the judges, contain too restricted and limited a definition of what evidence should be allowed under a plea of insanity. We also submit there is no real distinction between the homicidal motive referred to in both the examples given by their lordships, in their fourth answer; in the former of which they considered the plea of insanity would apply, and in the latter that it would not.

According to the doctrines thus laid down by the judges, no plea of insanity can be successfully maintained in criminal cases, except in the case of an idiot or fatuous person, and perhaps, in rare instances, of furious mania.

In order to illustrate our views, it is important to bear in mind that the greater number of lunatics are not entirely deprived of moral discernment, but on the contrary, that they are on many subjects perfectly rational, and display the most astonishing acuteness. In cases of mania, we frequently observe, that they possess partial reasoning powers; what we mean is, that they are able to comprehend some objects or ideas in their ordinary relations. We are therefore of opinion that, unless a person can view all ordinary subjects correctly in all their bearings, and possesses the knowledge of right and wrong, and the power of distinguishing between good and evil, that person cannot be deemed sane.

It seems opposed to common sense, that a person whose reason has been so far dethroned as to deprive him of moral self-control, and to permit him to commit the great crime of murder, shall at the same time be considered responsible for his actions; while another, whose mental disease is slight, but because he is docile, and capable of being easily made the dupe of designing persons, and who under the delusion, say for example of being possessed of great wealth, makes extravagant purchases of lands, houses, &c., is thereupon adjudged by the law incapable of managing himself, or of giving instructions for the management of his affairs.

Why is it that, in a criminal case, where life is frequently at stake, the question of responsibility is confined to the narrow inquiry whether the individual has the power of distinguishing right from wrong; while, in a civil inquiry, all the circumstances are gone into, and, practically, the question, upon which a life would depend in the former case, only forms one of the various points in the latter? These practical applications of the law are anomalous, and it is notorious that in both classes of cases juries often bring in verdicts directly at variance both with the law as laid down to them, and with the evidence. To our minds, such variances are the best possible evidence of radical defects in this department of our jurisprudence.

Where insanity is alleged, the characteristic features of the individual case should be carefully and scientifically investigated; as otherwise, according to the dicta of the judges already stated, it is not only possible, but highly probable, that one person in whom the symptoms are distinctly marked may, through the sympathy of the jury, be confined for life; whilst another, in whom more obscure symptoms would be recognised at once by medical men of experience, but which might perhaps have passed unnoticed by, or have but little weight with, either judge or jury, would, through the peculiarity of the evidence, suffer the penalty of death. We believe, however, that (from motives of humanity no doubt) the plea of insanity has been more frequently advanced and overstrained by professional men than it ought to have been. It is of the highest importance, therefore, that the doctrine of human responsibility should be clearly expounded, and before citing any authorities, we wish to premise that, in forming our opinions, we must not judge the person alleged to be a lunatic, or irresponsible, by contrasting him with others; but by comparing the state of his mind at the time he committed the alleged criminal act, with its condition when he was known and recognised as possessing a healthy mind.

"In investigating the nature of insanity"* (says a learned and accurate observer, in one of the most philosophical works on this subject with which we are acquainted), "the first caution to be observed is not to confound disorders of mental functions with natural qualities, which sometimes strongly resemble them. Many men, in the full enjoyment of health, are remarkable for peculiarities of character, and idiosyncrasies of thought and feeling, which contrast strongly with the general tone and usages of society, but they are not on that account to be held as insane, because the singularity for which they are distinguished is with them a natural quality, and not the product of disease; and from the very unlikeness of their manifestations to the modes of acting and of feeling of other men,

* Dr. Andrew Combe, "Observations on Mental Derangement." 1831.

such persons are, in common language, said to be eccentric. *It is the prolonged departure, without an adequate external cause, from the state of feeling and mode of thinking usual to the individual when in health, that is the true feature of disorder in mind;* and the degree at which this disorder ought to be held as constituting insanity, is a question of another kind, on which we can scarcely hope for unanimity of sentiment and opinion. Let the disorder, however, be ascertained to be morbid, in its accurate diagnosis; because it is impossible that such derangement can occur, unless in consequence of, or in connection with, a morbid condition of the organ of the mind; and thus the abstract mental states, which are justly held to indicate lunacy in one, may, in another, speaking relatively to health, be the strongest proofs of perfect soundness of mind. A brusque, rough manner, which is natural to one person, indicates nothing but mental health in him; but if another individual, who has always been remarkable for a deferential deportment, and habitual politeness, lays these qualities aside, and without provocation or other adequate cause, assumes the unpolished forwardness of the former, we may justly infer that his mind is either already deranged, or on the point of becoming so. Or if a person who has been noted all his life for prudence, steadiness, regularity, and sobriety, suddenly becomes, without any adequate change in his external situation, rash, unsettled, and dissipated in his habits, or *vice versâ*, everyone recognises at once, in these changes, accompanied as they are by bodily symptoms, evidences of the presence of disease affecting the mind, through the instrumentality of its organs. It is, therefore, I repeat, *not the abstract act or feeling which constitutes a symptom—it is the departure from the natural healthy character, temper, and habits, that gives it this meaning;* and in judging of a man's sanity it is consequently as essential to know what his habitual manifestations were, as what his present symptoms are. Just as in investigating stomachic affections, we do not compare the variations of appetite or the strength of digestion, with any fixed or imaginary standard, but always judge of their value as symptoms, in relation to their former state; because the moderate appetite which is natural in constitution, occurring in a person who had previously been remarkable for keenness and power of digestion, would justly be considered

as an indication of a loss of health; whilst the voracious appetite natural to a third, would in a different constitution be as sure an index of stomachic disease."

According to the above statement, we apprehend that few medical men would have much difficulty in deciding most cases of alleged insanity; but in a case where the person has made himself amenable to the criminal law, this definition falls short of the prescribed legal tests, for although the criminal's condition might answer in every respect to the above description, the definition would be futile if it were shown that he had a knowledge of the character of the act which he committed, and had the power of controlling his will. Now the majority of persons confined in lunatic asylums, and undoubtedly insane, not only have the power of distinguishing between right and wrong, but are perfectly well aware of all the circumstances relating to their reprehensible actions; they feel the necessity of concealment, and display a most wonderful acumen in carrying out their plans. If we could ascertain their thoughts, which cannot always be done, we should find that they are well aware of the illegality of their acts and of the consequences attaching to them. What is very important to bear in mind is that such conditions are associated not unfrequently with uncontrollable and dangerous delusions, which would inevitably lead in many instances, if the patient were at large, to the perpetration of crime. Instances frequently occur where the individuals themselves, feeling that they soon would be overpowered by their malady, have by a desperate effort of departing reason voluntarily sought the protection of an asylum, in order to prevent their committing acts against which they felt their own self-control was totally inadequate.

Could it in the present day be argued successfully, that a man impelled by such influences, who on one day voluntarily surrendered himself at an asylum, to avoid committing a murder, and on the next did commit murder on one of the asylum attendants, ought not to be, "Not Guilty

on the ground of insanity?" The principal evidence in such a case being his own confession on the previous day, that he was about to do an act that was wrong, would a jury find that man simply guilty of murder? But let us pass, in further illustration of the subject, from an imaginary to a real case. Monsieur Georget, a distinguished French authority, in his "Discussion médico-légale sur la Folie," tells us of a man who was a revenue officer connected with a large manufactory in France, who after fulfilling for many years the duties of his office most satisfactorily, and who had never shown any signs of mental aberration in his official letters, or reports, or otherwise, one day sent for one of the heads of the establishment, to sign some official document. Whilst in the act of writing he was shot dead by the officer, who immediately afterwards committed suicide. It was only by accident, after his death, that amongst his papers were found letters addressed to the *Avocat-Général*, showing that he had been insane for years, and had premeditated the act, and justified it. What, may we ask, would have been the fate of this man, according to our law, had he been timely arrested, and tried, without a searching scientific inquiry into the antecedents of his life?

Baron Hume, of the Supreme Court of Judicature in Scotland, it appears to us has laid down the law as regards criminal responsibility in a more broad and practical manner than the English judges:

"Though a person," he says,* "may have that vestige of reason which may enable him to answer in the general that murder is a crime, yet if he cannot distinguish a friend from an enemy, or a benefit from an injury, but conceives everything about him to be the reverse of what it is, and mistakes the ideas of his fancies for realities; these remains of intellect are of no sort of service to him in the government of his actions, in enabling him to form a judgment as to what is right or wrong on any particular occasion."

* Commentaries on the Laws of Scotland: Vol. I., p. 36.

Here we have a distinct line of demarcation drawn between the knowledge of right and wrong and the question of responsibility, which to our minds is comprehensive enough. Again, one of the most illustrious lawyers of his time (Lord Erskine), who, more than any one else, knew the sinuosities and tortuosities of the human mind, and who analysed in the clearest manner every case with which he had to deal where insanity was alleged, expresses himself thus:

"In all the cases which have filled Westminster Hall with the most complicated considerations, the lunatics and other insane persons who have been the subject of them, have not only had the most perfect knowledge and recollection of all the relations they stood in towards others, and of the acts and circumstances of their lives, but have in general been remarkable for subtlety and acuteness. These are the cases which frequently mock the wisdom of the wises in judicial trials, because such persons often reason with a subtlety which puts in the shade the ordinary conceptions of mankind; their conclusions are just, and frequently profound, but the premises from which they reason, when within the range of the malady, are uniformly false, not false from any defect of knowledge or judgment, because a delusive image, the inseparable companion of real insanity, is thrust upon the subjugated understanding, incapable of resistance, because unconscious of attack."

It will have been observed by the extract set out at the opening of this article, that the judges commenced their conjoint answers, by deprecating the giving of *ex officio* opinions, and that they acknowledged the difficulty of applying them to actual cases; and Mr. Justice Maule, whose keen and analytical mind felt and foresaw the many difficulties and responsibilities of answering hypothetical questions upon so delicate and obscure a subject as the workings of the human mind, expressed himself more strongly upon that point in his separate reply to the questions of the House of Lords. That learned judge expressed his views thus:—

"I feel great difficulty in answering the questions put by your lordships on this occasion. First, because they do not appear to

arise out of, and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts, not inconsistent with those assumed in the question. This difficulty is the greater, from the practical experience both of the bar and the court being confined to questions arising out of the facts of particular cases; secondly, because I have heard no argument at your Lordship's bar or elsewhere, on the subject of these questions; the want of which I feel the more, the greater are the number and extent of questions which might be raised in argument; and thirdly, from a fear of which I cannot divest myself, that as these questions relate to matters of criminal law, of great importance and frequent occurrence, the answers to them by the judges may embarrass the administrators of justice when they are cited in criminal trials."

It is abundantly evident from what has been already stated, that there is much difficulty in applying the views of the judges as delivered to the House of Lords, and in meting out justice equably on general and well-defined principles, where insanity is alleged in bar of punishment. This has been sufficiently proved by the manner in which the judges themselves have in particular cases felt constrained to sum up—more in accordance with Mr. Justice Maule's views than their own—as well as by the tendency of juries when left without unbiassed professional assistance, to return the milder verdict. Public discussions of the results of these inquiries, have disclosed a considerable amount of dissatisfaction with the present state of the law, as was evidenced in the recent case of Townley, who was first found guilty by a jury, then reprieved on the ground of insanity, and ultimately, on committing suicide, found to have been insane by a coroner's inquest. It behoves us, therefore, seriously to consider what better process can be adopted without interfering with the independence of the judges on the one hand, and the rights of the jury on the other. Considering the necessity and advantage, from the nature of the malady, of having skilled opinions, and that the

elucidation of truth in such cases depends so much upon carefully directed professional inquiries, and considering also that in all the recent important civil as well as criminal lunatic cases, a system of hired advocacy on the part of medical witnesses, has been so employed as to materially lessen in the estimation of the Bench, of the Bar, and of the jury, as well as of the community generally, the value of their evidence, we think that in every criminal and civil inquiry, where the question of lunacy arises, or is likely to arise, the court ought (as in the far less important case of nautical inquiries, where the judge is assisted by the Trinity Brethren), to have the aid of some well known and unbiassed medical men, to assist in the elimination of the professional portion of the case, with power to make such preliminary investigations as circumstances may render necessary. These assessors should be selected from among men of character and position, and be possessed of extensive knowledge and experience in regard to the nature and symptoms of insanity. They should be appointed by the Government, when called upon to act; and although it would not be necessary that they should be debarred from private practice, yet it should be a condition of their appointment, that they do not appear as witnesses on either side in any cases in course of public investigation, nor sit upon any case as assessors, in which they have been previously consulted. In France, a somewhat similar system has been found to work well. Upon a jury finding a verdict of "plus innocent que coupable," the *Avocat-Général* (the Public Prosecutor, analogous to our Attorney-General) has the power to have the extenuating circumstances of the case thoroughly investigated, and the course of law is then carried out according to the results of such investigation. By the French penal code, insanity, once proved, exempts from punishment those who have committed criminal acts. "Il n'y a ni crime ni délit lorsque le prévenu était en etât de démence au temps de l'action." *

* Article 64. Penal Code.

Their system is not perhaps strictly applicable to our forms of criminal procedure; but by simply changing the period of the investigation from after the trial (as in France) to before or at the trial, as above suggested, the system would work in England, and perhaps even more beneficially than the French, as it would bring forth all the facts and circumstances *pro* and *con* at the trial, and the jury would have the opportunity of considering them when finding their verdict. The peculiar circumstances of every case should be aided by the discrimination of the judges, and the scientific knowledge of the assessors on the one hand, and by the common sense of the jury on the other. The onerous duties at present imposed upon the Bench, the Bar, and juries, would thereby be lightened and more satisfactorily discharged, and the public would generally be more disposed to acquiesce in their verdicts than at present. We cannot, however, in justice to all parties concerned in the administration of our criminal law, conclude these remarks without stating that to those who happen to be present in court, and to have the same opportunities of forming an opinion as the jury, the result of the verdicts have, even under the present defective system, owing to the learning of the Bench, the talent of the Bar, and the patience of the juries, been on the whole satisfactory. We deem it only fair to say this, because a section of the public have been lately too much given to the habit of expressing their views *ex cathedra* as to the correctness or incorrectness of the verdicts; such views being usually derived from abridged newspaper reports, without the important test of the demeanour of the witnesses, and the various other circumstances that can be appreciated only by presence at the trial. It is sufficiently arduous for the court and jury under the pledge of their oaths, to "well and truly try" the case, without their being afterwards subjected to the annoyance of having the solemn result of their verdict and judgment placed at the mercy of every casuist and scribbler.

ART. IX.—ON THE REPORT OF THE PATENT LAW COMMISSIONERS.*

THE law gives to an author, for a term of years, and for any longer continuance of his life, the exclusive right to make copies of his book. The term of copyright is such as to provide, under a common rule, for the remuneration even of those classes of literary effort which are the most slowly productive. The range of copyright has been enlarged by the expansion of international relations. And the principle of that composition of ideas which is the subject of copyright, may be claimed and secured, under forms the most diverse, by reserving on the title-page the right of translation.

Copyright is property in a class of the products of mental labour. What is made with the hands is property by nature; what is made with the mind is appropriated by law, so far as the law gives an exclusive title to the mental basis of the material result. In copyright this mental element is appropriated unobjectionably. In the analogous privilege of patent-right, the benefit of stimulating and rewarding invention is qualified by so much legal meddling with trade, that some thinking men would be glad to get rid of patents altogether.

I am asking the Society to consider the working of the patent law, by the light of the Report of Her Majesty's Patent Law Commissioners, and the evidence appended to it. Copyright and patent-right being analogous privileges, the one working well, and the other working ill, the best way to arrange my subject is to observe the differences between the two.

One difference there is which may be eliminated from the inquiry. The author creates the book; the inventor only

* A Paper read by Mr. Robert Wilson at a Meeting of the Jurisprudence Department of the National Association for the Promotion of Social Science, on Monday, March 27th, 1865.

discovers the method of producing the manufacture. There cannot be a double creation; but there may be a concurrence of discovery. While, therefore, copyright lights upon the author spontaneously, as a legal consequence of authorship, patent-right flows through an apparatus for discriminating between rival claimants of invention. The apparatus actually in use for this purpose is found to work well; the Report approves of it; and I do not propose to trouble the Society with any remarks upon it.

Confining our attention, then, to the bearing of copyright, or patent-right, upon the interests of the public, we may observe that nobody is injured by the author's acquisition of a presumptive monopoly in a literary production, without prior evidence of novelty, and irrespectively of merit. For a book does not obstruct the writing of another book, even on the same subject. But it is a different question whether a patent ought to be granted, as of course, for any composition of substances or appliances, which anybody thinks fit to define in writing and to call new. For a wrongly granted patent, like a log upon the highway, is a nuisance till removed.

It might, indeed, be harmless to presume novelty and to dispense with merit in a patented manufacture, if the subject of patent-right were as definite as the subject of copyright. But this is not so. For, whereas copyright is limited to a form of verbal expression, or its equivalent in other languages, patent-right extends, beyond the new manipulation which the inventor elaborates, to the principle of the manufacture which that manipulation exemplifies. So that many a patentee would be unable to limit with precision the scope of his patent-right, even if the desire to do so were more general than it is.

Whether to ascertain the presence of merit before granting the patent, was justly treated by the Commissioners as a chief question of patent law reform:—

"Have you," said Lord Stanley to Sir Francis Crossley (1,549), "considered the question, whether there ought to be a preliminary

inquiry before the granting of patents, in order to prevent a multiplication of useless or frivolous patents ?"

"I think," said the witness, "that it would be very difficult for anyone appointed by the Government to decide what is a frivolous patent. I believe that a patent was taken out for simply putting india-rubber at the end of a glove, so as to make it tight round the wrist; that might have been considered a frivolous patent, but I believe it was thought to be a very good one in the trade, and it was new and useful."

Profitable, I dare say it was; but an objector might plausibly ask what the patentee had done to entitle himself to a fourteen years' monopoly. He had made a convenient sort of glove, likely to be well received by the public; being first on the field he had the prestige of introducing it; and he might fairly claim protection in the use of any distinctive name which he might think fit to give to it. But why was the free trading of the public to be suspended for fourteen years, in favour of a scrap of india-rubber in the wrist of a glove? Would the use of india-rubber in gloves have been prevented or postponed by withholding the monopoly? Scarcely so; for if the new glove was saleable, there was nothing to prevent its being made and sold without the monopoly.

India-rubber had been put into braces, trowsers, drawers, waistcoats, boots, clogs, and pretty well every other article of civilised dress, with the assumed exception of gloves. Why, then, give a fourteen years' monopoly for so obvious a consequence of things already done, as the transfer of the india-rubber to the gloves?

The exception that might be taken to the glove-patent is twofold, viz.: first, that its object was frivolous—a change in the fashion of an inconsiderable article of dress; and secondly, that its subject was frivolous—the invention, so to call it, of shifting an elastic band from one piece of dress to another.

Let us now suppose, for the sake of argument, that even under the present law the glove patent was invalid, on the

ground of a total absence of invention—who was to dispute it?

"It is," said Mr. Grove (1,018), if I may venture to apply his general remarks to a particular case, "the patentee's interest to give a very large sum to support his patent; his patent, although for a very trivial thing, may, taking the vast extent of sale, be a very lucrative affair . . . the public is a scattered body, not one of whom has sufficient interest to meet with equal force the patentee; and that," continued Mr. Grove, "is one of the difficulties which I should like to see my way to remedying."

From the instance of the elastic glove-wrist, we will turn for a moment to a more solid and bulky specimen of triviality.

"Nearly the whole of the patents for the boilers of steam-engines at this moment," said Mr. Scott Russell (768), "are of no practical value to inventors or to the public, but they are continually getting every man who makes a boiler into a scrape with some patentee, because almost every conceivable form of boiler, and bit of boiler, having been previously patented, one cannot make any sort of boiler without infringing some man's patent."

So much for the difficulties of engineers; from the evidence of Rear-Admiral Robinson, the Comptroller of the Navy, it would seem that obstructive patents were taken out for the special benefit of Government.

"The inconvenience," said the Admiral (2,113), "which the Duke of Somerset has mentioned, resulting from patents applied to ship-building, is so very great, that it is scarcely possible to build a ship, being a combination of wood and iron (and you always have some of each in a ship), without treading upon somebody's patent; and I am entirely of opinion that the patents are drawn up for that especial purpose, without any idea of their being practically applied for the benefit of the public, but only that the patentee may lie in wait for a colourable evasion of his patent taking place, and come upon a public department."

Even a dove will bite if you torment it; so the Admiralty has at last made out that the Crown is not bound by a patent.

But can we distinguish between inventions which merit a patent and inventions which do not?

"Looking," said Lord Stanley to Mr. Grove (1,029), "at the practical difficulty of the question, although none of us would have any difficulty in pointing to certain inventions which would be entitled to a patent, and to other inventions which were so trivial that they would not be entitled to a patent, if any exclusion on the ground of triviality were allowed, still, would not the great bulk of the whole, say perhaps seven-eighths of the whole, lie so far between the two extremes as to create an immense practical difficulty in deciding upon them?"

"I do not think so," was Mr. Grove's answer. "I think there would be an intermediate line where it would be very difficult to decide; but I think a very large number of inventions would be so clearly below the line that they might be safely rejected."

The evidence in favour of some method of discrimination is balanced by opposite evidence of equal weight.

"Would you," said Mr. Grove to Mr. Carpmael (273), "grant a patent, without any restriction, for anything which the law now calls an invention or an improvement, provided it be fairly described on the face of the specification?"

"Undoubtedly," answered Mr. Carpmael. "I believe that that is the least of the evils; that it is better to grant a patent upon the risk of the inventor as to whether his invention is new and useful, than to attempt to investigate his invention, which may never come to anything, and yet, if the investigation is made in every case, it would cost a great deal of money without a proportionate benefit to the public or to the inventors."

"Then you see no inconvenience," said Lord Stanley (274), "in a multitude of temporary monopolies being created, a very large proportion of which are for inventions of so trivial and worthless a character that it is not found worth while by the inventors themselves to continue their patent beyond the first three years?"

"Forty years' experience," continued Mr. Carpmael, "has shown me that there is no prejudice whatever in granting these patents. I have no hesitation in giving the most decided opinion as to there

being no prejudice to the manufacturer or the public by these patents being granted."

"I consider it next to impossible," said Sir John Romilly (p. 178), "in most cases, to determine beforehand and until the invention has been put into practical operation, whether an invention for which a patent is claimed is of a trifling or frivolous nature. I believe that the best and most experienced persons might frequently be mistaken, and form an erroneous judgment as to the value of an invention."

"It is not advisable, in my opinion," said Lord Chelmsford (p. 179), to change the present system. An invention which is apparently trivial, but really useful, might be rejected; whilst a trifling invention of no utility will be neglected by the public, and the patentee will alone bear the consequences of his idle and frivolous experiment."

Mr. Cowper and Mr. Alfred Newton proposed to take notice of triviality, to the extent of refusing patents where there is no real invention.

"I consider," said Mr. Cowper (p. 210), "it would be very difficult for anyone to say how small or trifling an article should be refused a patent, but it would not be difficult for a person conversant with the particular trade or process to say whether there were any real invention."

"I think," said Mr. Newton (1,847), "that it should be open to anyone to make an obvious application of any manufactured article that is to be purchased in the open market, irrespective of any patent, simply because there is no invention in it. . . . There could be no difficulty in coming to a conclusion upon it."

Absence of invention, as explained by Mr. Newton in the passage which I have just read, is not far removed from want of novelty. It is well known to be of the essence of a patent that the thing patented should be new But the applicant's assertion of novelty is accepted at his risk, and the patent is issued without investigation. Nine out of the ten Commissioners propose to alter this practice. They recommend—

"That a careful inquiry be instituted under the direction of the law officers of the Crown as to whether there has been any previous documentary publication of the invention, either by a grant of letters patent or otherwise; and if such publication have taken place that the patent be refused."

This recommendation gives an official sanction to an opinion which an influential member of this Society, Mr. Thomas Webster, has for many years consistently advocated.

It appears from various questions and answers to have been thought desirable that any preliminary investigation should be preceded by a complete publication of the invention. This object might be attained by postponing the grant of the patent till after the publication of the complete specification.

"I assume," said Mr. Webster (1,706), "that the objections [of the examiner] would be stated in writing; that the party applying for a patent, would be referred to such a specification or book, and it would be said 'your patent cannot be granted, because the invention exists in such a publication,' and then the inventor himself would look at it, and it might very possibly happen that there would be a good deal of truth, both in the inventor's view, and in the officer's view, and the result would be that perhaps the patent would be granted with some modification for an invention that was clearly new."

So that we might have, first, the applicant's unmutilated proposition in the complete specification; and this should be preserved intact, for even bad specifications may be suggestive (311 to 318, and 1,388). Secondly, a summary of the result of the examiner's searches for prior publications; and thirdly, perhaps, a modified specification describing and claiming so much of the invention originally specified as the law officers should have allowed to be patented. This modified specification might be appended to the patent, as proposed by Mr. Hindmarch in his separate report, or embodied in the patent, as proposed by the late Mr. Farey in his evidence before the Committee of the House of Commons on the

Patent Law, in 1829 (p. 19). Perhaps the granting of the patent might be made conclusive proof of the accordance of the invention ultimately patented with the title of the patent and with the provisional specification.

A preliminary investigation would of necessity involve a judgment upon the form of the specification; for how could novelty be predicated of an undefined invention? One would think that either the specification ought to be supervised by authority, as Mr. Hindmarch proposes; or else the patentee ought to be rigorously held to have claimed whatever is described in his specification and is not expressly disclaimed.

"As far as I have seen," said Mr. Justice Montague Smith (1,243), "every man who makes any change whatever in a machine, which he thinks at all beneficial, takes out a patent for it, and embraces probably the whole machine, and leaves you to find out where his little improvement is."

Connected with the form and supervision of the specification, is the liberty allowed to a patentee, by leave of one of the law officers, to disclaim portions of his original claim, and even to alter the language of his specification or the title of his patent. In America, according to Mr. Newton's evidence (1,920 to 1,933), there is an extravagant power of alteration. The more modest provision of the English law, which was introduced by Lord Brougham's Act of 1835, is generally admitted, I believe, to have worked well on the whole. Under the earlier law, a patent was invalid unless the whole of the original title and specification could be sustained. Under the later law, a patent is invalid while continuing to comprise an unsustainable claim, and it may be invalidated even by an error of description; but the defect is in either case cured prospectively by the disclaimer or memorandum of alteration. Power to waive a claim, or to correct an error, is in principle very reasonable. Yet even here, also, we encounter serious practical difficulties. For, although the disclaimer or memorandum of alteration cannot legally enlarge the patent-right,

it may sometimes practically do so, or attempt to do so. In the sewing machine case, lately tried before the Lord Chancellor, and of which there is a notice in the Appendix to the Report (p. 220), there were several trials in courts of law, one of which occupied six whole days; and there were also 134 suits in Chancery, all about a claim of invention which at last was seen by the court, as by the defendants it always had been, to be quite out of the scope of the original specification; but which the plaintiff had hoped to spell out of some general expressions that had been left standing alone in the specification, after a great deal of particular description had been removed by a disclaimer. There seems to me to be no sufficient reason for ever allowing any part of the original description to be withdrawn or tampered with. Let the patentee add an explanation to rectify a mistake, or let him waive part of his claim, and let it be declared that his patent shall not be invalidated by the continuance in his specification, or in his title, of descriptive matter which has become irrelevant; but let us, I should say, preserve the whole of the original matter as the necessary means of properly construing each separate part of it.

I have been digressing a little from the important proposition of the Commissioners that there should be a preliminary investigation of the question of novelty.

For and against this proposition, opinions of equal weight might be cited from the appendix; I have space only for one of them, the opinion of Sir Roundell Palmer; after extracting which, I will refer shortly to the experience of foreign countries.

"Subject," said the Attorney-General (p. 80), "to the suggestions which will be found in my answers to the remaining questions" (one of which suggestions was to discontinue the granting of frivolous patents), "I do not see any reason for thinking the present mode of obtaining patents unsatisfactory. I leave others to form and express their opinions as to the value and operation of that part of the present system which depends upon the supervision of the law

officers of the Crown. But I am unable to conceive how any satisfactory kind of preliminary investigation, professing to be of a much more searching character, could be usefully applied to the great majority of applications for patents. Even if an officer were appointed to check all applications as a general opponent on behalf of the public, it is manifest that the investigation would still be, in a high degree, inconclusive and unsatisfactory. Such an officer could not possess that practical knowledge on the vast variety of subjects over which those applications range, which would be necessary to make his opposition really efficient; and many questions must always be left open (especially upon the cardinal point of novelty), which no vigilance can anticipate until the alleged invention has been made public, and the experience and opposing interests of practical men have been brought to bear upon it. Without some such officer, a mere *ex parte* investigation of the novelty of invention in unopposed cases, would be absolutely worthless; while, in opposed cases, it would never be safe to rely on the sufficiency of the knowledge and means of knowledge possessed by the particular objector, or on his good faith and perseverance in his opposition when favourable terms of arrangement might be offered. Any attempt to establish a new machinery for such a preliminary investigation must necessarily be cumbrous and expensive, and must much increase the cost of obtaining patents to the inventors. It would be open to the further objection, that if the judges were non-scientific men, they would bring to the inquiry no knowledge of their own which could be trustworthy and adequate upon the question of novelty; and could therefore do no more in substance than is now done, or might equally well be done, by the law officers of the Crown; while if they were scientific men, their practical knowledge on many subjects must still be limited, and they could hardly be altogether free (or at all events they might not have the credit of being free), from all bias and partiality, whether of an interested or of a disinterested kind; and under these circumstances their decisions could not be expected to command the confidence of inventors generally, or of the public. On the whole, I think that any such investigation (unless its results were made conclusive of the validity of the patent, which I presume nobody would propose), would be likely to prove oppressive towards inventors; while, on

the other hand, I do not think it would really ensure to the public much greater security against improper patents than is obtained under the present system, or might be obtained by such amendments and modifications of that system as may be found advisable."

Passing from opinions to facts, we find (p. 31), that in France, Austria, Sardinia, and Belgium, the method of preliminary investigation has been tried and abandoned; and that in Prussia and America, though continuing in use, it does not give satisfaction.

The American practice deserves our attention, not only absolutely, but also comparatively, being less effective than our own; for the applications which lapse are proportionately more numerous in England than in America. In order to make this comparison intelligible to those who may not have a practical acquaintance with the subject, it is necessary to explain that our Patent Law Amendment Act of 1852, introduced a system of periodical payments; partly as a relief to poor inventors, and partly as an inducement to drop worthless applications or patents. A tax of £5 is paid on the application; on the patent and specification, £20 more; at the end of the third year, £50; and at the end of the seventh year, £100. So efficacious is the pressure of this recurring taxation, that whereas in America, in 1861, only 1,260 applications were rejected out of a total of 4,643; in England, in the same year, 1,218 applications were voluntarily dropped (11 others being refused) out of a total of 3,276; and of English patents sealed, not a third survives the third year, nor a tenth the seventh year (pp. 28, 159).

Mr. Webster suggested (1,669) that patents may be dropped "because it is found more convenient to take out other patents." But there is margin enough to allow for exceptional cases of this kind, without impeaching the inference that our English method, with all its admitted faults, is more efficacious than the American method. And, turning from the question of efficacy to the question of cost, we learn from Mr. Woodcroft (91) that the Americans pay a larger annual

price for their preliminary investigation, than we pay for the whole of that extensive system of publication which Mr. Woodcroft himself has so admirably developed and directed.

The preliminary investigation of America is a comprehensive one; embracing the question of merit, as well as the question of novelty—or, to speak more correctly, the whole question of merit, inclusive of novelty. The failure of the American system might seem to condemn the principle of preliminary investigation, were it not for the terms of a report of an American patent commissioner, Judge Mason, given at page 148, and which seems to be our latest information on the subject. For Judge Mason there treats the patent privilege as the inventor's natural right of property in what he has created; showing that, as commissioner, he must have dealt with the applications which came before him, not as a dispenser of privileges, but as an administrator of legal titles; and it is conceivable that preliminary investigation should fail on the footing of law, yet succeed on the footing of discretion. Now if, as perhaps will be admitted, the application for a patent is not the assertion of a right, but a prayer that a national reward may be conceded to the author of a national benefit—it is not by the force of predetermined rules of law, but by the personal exercise of a comprehensive discretion, that the patent ought, on principle, to be granted or refused.

The subject of a valid patent must be "the working or making of a new manufacture within this realm." What is absolutely useless is not a manufacture; and this is the only sense in which the law, if I rightly understand it, imposes the condition of utility. There cannot, for example, be a valid patent for a candle that will not burn; but there may be for a new candle-material more costly than sperm, yet more offensive and less inflammable than crude tallow. That mere novelty, unless useless, is meritoriously useful, might be a right principle centuries ago, when manufactures were scanty and undeveloped; but we are entitled now-a-days to expect in

the subject of a patent the character of a relative merit, in comparison with the state of knowledge at the time. And the question of relative merit must, of necessity, be a question of discretion.

But must the exercise of discretion precede the granting of the patent? Would it not be enough to allow the question of merit to be raised afterwards, as a ground of resistance to the patent, by a plea that the patented invention is not meritorious? I answer in the words of Mr. Grove (1,034)—

"We have at present an admitted difficulty; the question is what are the means of getting rid of it? I am far from saying," he added, with reference to his proposition that the merit of the invention should be substantiated before the granting of the patent, "that the means do not in themselves present difficulties; the question is whether the balance of difficulties is not more one way than the other."

These words of a Commissioner justify me in saying, that the Report proposes too much or too little; that we should have either no preliminary investigation, or a complete one. And as the general feeling seems to be that the patent law, if it is to be preserved, must be changed, I accept the latter alternative. I propose, in short, that the granting or refusal of a patent should be determined in each case, with reference to all its circumstances, by an exercise of discretion. Is it said that meritorious inventions, perhaps a good many of them, will be rejected? I admit this consequence as inevitable; but if the specifications should be registered, with the grounds of rejection, the disappointed applicants might, in some small degree, be compensated by the nation, when the merit of their inventions should have become evident, by honorary distinctions and pecuniary rewards. Or even if this were not so, we had better have the nerve to cut off a limb, than sit still while the patient is dying of lockjaw.

The discretionary power of rejection might be exercised, as Mr. Scott Russell proposed (823), not only at starting, but

also when stamp duties become payable at the end of the third and seventh years, perhaps also at some later stage:—

"That is to say," as Mr. Grove observed to Mr. Scott Russell, "you would make it incumbent upon a patentee, when he came to make his second payment after the three years, to make out a case before a court, and also at the end of seven years, and so on?" "Yes," answered the witness, "I hold that that is not a new principle, for you at present do it beyond the fourteen years."

Discretion, then, at starting; discretion at the end of the third year, and at the end of the seventh year, and perhaps also at some period after the seventh year—discretion, eked out by a national compensation or acknowledgment, in honour and money, to unappreciated merit—this principle I submit to the Society, as a possible remedy for the multifarious practical evils which at present so largely qualify the benefits of the patent law. Discretion, as the source of discretionary law; the principle from which has been developed the splendid system of equitable jurisprudence which regulates the decisions of the Court of Chancery.

My proposition has the misfortune to be opposed to the Report; but it also has the advantage of resting on the evidence of a Commissioner eminently qualified by legal and scientific attainments, and by experience, to deal with the question judiciously.

The Report proposes that "no evidence other than documentary evidence should be admissible;" but here is another practical difficulty. For the House of Lords lately decided, in the case of Betts and Menzies, that inasmuch as to work without result does not affect a subsequent patent, so likewise to publish a method of working without result does not affect a subsequent patent; and, consequently, that utility, that is to say the absence of uselessness, is as necessary to the sufficiency of the prior publication as it is to the validity of the patent which the publication seems to anticipate. And the question of utility depends on evidence extrinsic to the document.

In almost every patent case, publications are brought forward, more or less resembling the specification, sometimes in terms almost identical with it; and yet it constantly happens that some difference, which to an examiner might seem trivial, but which to practical men is the difference between failure and success, carries the patent triumphantly through the most searching legal investigation.

Such being the condition of things, as every day's experience demonstrates, how can a purely documentary investigation supply our admitted needs? It is possible, by reference to documents alone, to "warn an inventor against his own ignorance," as Mr. Webster proposed at our York meeting; giving him the patent at his own risk, if he insists on taking it. Or it is possible to investigate the antecedents of the alleged invention upon evidence generally and predominantly, but not exclusively, documentary. But to do what the Commissioners propose to do, would, I venture humbly to think, be to simplify the method of trial, by arbitrarily shutting out evidence necessary to the discovery of truth.

In Betts and Menzies, there was an old specification so exactly like the specification of the Plaintiff's patent, that the Judges of the Queen's Bench, and afterwards the judges of the other courts in the Exchequer Chamber, took upon themselves to pronounce, as a matter of law, and notwithstanding a verdict for the plaintiff, that the patent was invalid. The House of Lords reversed these decisions, on the ground that the old specification was nothing unless it would work: and the patent has been extended in the Privy Council, and upheld in more recent litigation. The Commissioners are proposing to reverse the decision of the House of Lords, by giving to some delegate of the law officers an authority higher than that of the fifteen judges.

"It frequently happens," said the late Mr. William Cubitt,* "that those things which cost the least, and are of the least real

* Report of 1851, sec. 1,534.

value and utility, meet with a rapid sale . . . . whereas those things that are very costly, like the invention or improvement of the steam-engine, or turning the great powers of nature to account by new and improved methods, seldom or ever become remunerative" . . . "Were it not," said the late Mr. Farey,* "for the difficulty of distinguishing the merit of inventions beforehand, I should recommend a previous inquiry and selection, and the terms to be made shorter for trifling patents, and larger for more important ones; but I fear such a system would be abused."

We may differ as to the expediency of a variable term originally; but to say, with eight of the Commissioners against two, that the original term is never to be prolonged; or to say with Mr. Reeve (1,808), that, to an invention which that term will not remunerate, the original patent should be refused, is, to my mind, like an expression of opinion that there ought not to be a patent law at all.

"Suppose," said Vice-Chancellor Wood to Mr. Scott Russell (811), "that a man discovers in Thibet or in the interior of China some very valuable process of dyeing, that it is in his breast alone, is that a case in which you think he ought to have a patent granted to him?"

The Commissioners have answered this question in the negative; rightly so, I think, if a rule must be fixed. But suppose that in an action on a patent for a dye invented in England, the defendant should say that the dye had been used in Thibet, or had been described in a pre-Adamite book to be found in the interior of China, must we send commissions to Thibet and to China to take evidence on these defences before the English action can be tried? Of course we must, if the defendant requires them to be sent; for if novelty throughout the world should have become the condition of validity, the foreign evidence will be relevant. Mr. Webster pointed out this difficulty to the Committee of 1851 (2,783); but I do not

* Report of 1829, p. 143.

find it mentioned in the recent Blue Book. It is not always an easy matter to try a patent case now; and it is rather the rule than the exception, in a case of importance, that the patent should have expired before final judgment is given upon it; what sort of trials we shall have, and when we shall get judgment, if the manufactures of the whole world and the languages of all nations are to be brought to bear upon the issues, I will not venture to predict. What I propose is, that evidence of foreign user or publication should not be admissible in the ordinary courts; but that a person opposing the grant or the continuance of a patent, should be allowed to bring forward such evidence as an element in the exercise of a discretion on either of these subjects.

On the question whether licenses should be made compulsory, I must, for want of space, content myself with repeating, as my own, Mr. Farey's opinion* "that it would be like attempting to provide means by law for fixing a fair rent for leasehold houses, or fixing a fair price for wages." But see the evidence given by Mr. M. D. Hill on this subject before the committee of 1851.† I would allow it to be shown, for what the evidence might be worth, in opposition to the patentee's application for a discretionary continuance of his patent, at either of the times fixed for consideration of the question of continuance, that licenses had been refused to honest and solvent applicants.

And now who is to exercise a discretion as to the granting and continuance of patents? The authority ought, in my opinion, to rest with the law officers; but for their assistance there ought to be a permanent board, combining legal, mechanical, and chemical talents, to exercise functions analogous to those of the chief clerk of a Vice-Chancellor. Perhaps one case in twenty, or a still smaller proportion of the business, would involve a personal exercise of jurisdiction on

* Report of 1829, p. 145.
† Report of 1851, ss. 1,994 and 2,688.

the part of the Attorney or Solicitor-General; and the occasional duty might be remunerated by a moderate fee on every application for a patent.

It would, I think, be indispensable to the working of the proposed discretionary jurisdiction that the unsuccessful applicant or opponent should have a right of appeal: and the best appellate jurisdiction would be the Judicial Committee of the Privy Council. The right of appeal might be troublesome at first, but only till the new practice should have been worked into shape. An appeal would not harm the respondent, for he might appear in person before the Judicial Committee, at a small cost: the appellant would be kept in check by a necessity, to which he should be subject, of giving security for the costs of the appeal. Even if there were no private respondent, I would not allow an unsuccessful applicant for the granting or continuance of a patent to appeal against the decision of the law officer without securing to the Patent Office their costs of maintaining the decision if it should be upheld in the higher court.

Mr. Reeve's evidence (1,804) seems to warrant a hope that the assistance of the proposed board might remove any indisposition on the part of the Judicial Committee to retain their existing original jurisdiction respecting the prolongation of patents.

Lord Chief Justice Erle has assigned cogent reasons (p. 222), for deprecating the establishment of any special patent court. What we really want is not a patent court, but a fourth law court of general jurisdiction, to relieve our overworked judges; and if we could persuade the Chancellor of the Exchequer to raise the Common Law Court of Chancery into a working court with five judges, we should, in my opinion, have done more for the cause of legal reform than we can hope to do by any speculative suggestions. Some relief, however, might be given to the judges by the proposed patent board. The members of it, one or more of them, might assist the judge on a trial, without relieving him from an undivided

responsibility. The board might also be useful in preparing a case for trial. I entirely agree with an eminent patentee, Mr. Lister (p. 184), in thinking that the ultimate decision upon a patent is in general right; nor do I see my way to limit either party to a precise statement of his case, before an action comes into court for trial: the trial itself, or the preparation for it, being sometimes necessary to show even to the plaintiff his exact cause of complaint; to the defendant, his exact means of defence. Yet it is no slight evil that the first trial in a patent action should be employed, as it commonly is, at an enormous cost, in ascertaining the subject of contest; and perhaps the natural desire of each party to ingratiate himself with the board, by candid explanations, might tend to define the issues at an earlier stage.

The subject of my paper touches upon a larger question, to which I will barely allude. May not those successive phases of difficulty, under which the Patent Law obtrudes itself at intervals on the attention of Parliament, be, like the endless political troubles of the Eastern question, the symptoms of a mortal disease? Are we sure that the English nation may not have outgrown the method of rewarding invention by monopoly?

That the patent law ought to be abolished was the burden of the evidence of the late Mr. Brunel and Mr. Ricardo, and of the evidence of the great railway counsel, Mr. Lloyd, before the committee of 1851. The same opinion is, rightly or wrongly, attributed to living statesmen and jurists personally and officially influential. Mr. Macfie has shown that it makes some way on the Continent. Sir William Armstrong propounded it in his evidence under the late Commission: among ourselves it is maintained by Mr. Hastings and Mr. Hawes. On the other hand I read, in Mr. Mill's great work on political economy, the unqualified opinion of our highest living economical authority, himself a member of this Society, in favour of a continuance of the patent law.

Mr. Bramwell, at our York meeting, enumerated instances of great inventions evidently fostered by the hope of reward. All around us are signs of inventive activity and industrial progress, due, as it seems to me, to the same powerful influence. Everywhere we see the patent law forcing new things into use, in spite of the sluggishness of habit and the obstruction of vested interests; and our possession of a benefit is cheaply accelerated by half a century, at the cost of a partial re-grant for fourteen years to the man who brings it to us. The Chairman at the York meeting gave to the patent law the credit for an advance in the rate of wages, consequent on each successive step in the progress of mechanical improvement.

Lastly, it is to be remembered that an ill-judged surrender of the patent law might involve an irreparable loss. As yet, the inventor's privilege rests on a long-continued tradition; it subsists, with some dissent but general approval, as an institution sound in principle, and, on the whole, beneficial in effect: it is supported at home by powerful interests; abroad, by a concurrent usage well nigh co-extensive with the civilised world. Abolish the existing patent law, and I should fear that protection to invention will have passed away for ever. Freedom of action and riddance of litigation would give to the change the superficial appearance of a great and palpable gain; while the countervailing loss, in value perhaps a thousandfold, of invention suppressed or retarded, might, to the common run of legislators, and even to the acute philosophic observer of the signs of progress or retrogression, be in great part imperceptible. Patent interests would dwindle and expire; adverse interests would strengthen and multiply; the example of England would be followed abroad; Parliament would scarcely re-enact an exception from the law of competition. On the whole, then, I trust that where the utmost evil of caution is temporary inconvenience, while haste may be the final relinquishment of a permanent good, we shall attend for the present to the question of reformation, and adjourn the question of abolition.

Notices of New Books.

[*** It should be understood that the Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance require it.]

The Law and Practice of the Court of Probate, &c., &c., &c. By Philip William Dodd, Solicitor, and George Henry Brooks, Proctor in Doctors Commons. London: Stevens, Sons, and Haynes. 1865.

In addition to the duty cast upon us as Reviewers to comment without restraint on this volume, as on other volumes submitted to us, we have a special invitation to do so in the preface signed by one of the authors. "In the present volume," he writes, "many errors, omissions, and imperfections will no doubt be discovered; the reader who will obligingly indicate them will impose upon us a debt of gratitude."

First then it appears to us that this book is too learned and diffuse for a guide to practice. This accounts for its bulk. It contains, including the *addenda* and *corrigenda*, but without Acts of Parliament and forms, just 1,000 pages. We will not apply to it the hackneyed description given to ponderous tomes, but it certainly has an unwieldy aspect. If, as has been said, there is a physiognomy in books by which we may learn their character as we may that of men from their faces, this volume supports that aphorism. We have remarked it is too learned for its object. Latin quotations may very well become a title page or dedication; or may not be out of place in the preface to a book on legal practice; but in the body of such a work, where we look for rules to guide us, as short and succinct as possible, it is embarrassing to have our attention diverted by some Latin quotation, whether in the text or in the notes; or by some historical analysis of the origin of ecclesiastical or other jurisdiction; or by the conflicting dicta of learned judges. Such matter would naturally be found in a treatise which either juridically or philosophically deals with a legal system, but we venture to say they are intrusions in such a volume as this, and they are not only unwelcome but practically detract from the value of the book. At the heading of the first chapter, which describes the procedure of the Prerogative Court—now partially obsolete—we have a long quotation from Ariosto's "Orlando Furioso," which has no other bearing on the subject-matter that

follows than that it describes "Discord" as being armed with legal implements and forms with which she may harrass the poor; and but for the word *procuratori* introduced, which we must translate proctors, the quotation might as well be applied to any other court of justice.

After these remarks we ourselves should be open to censure, were this review not of a different nature, and devoted to a different purpose, when we say, "non his offendar maculis." We should act in the spirit of that forbearance if there were not more serious defects in this volume. It is not intended here to thoroughly examine these pages; in a future number we may probably do so; but in the cursory view we have been enabled to take of them, we find propositions stated, which if they do not mislead must create doubt; *e. g.*, at page 393, chap. 3, on Administration, after stating where it is necessary, it is added, "Letters of administration of a person's estate and effects must be obtained from the *Court of Probate.*" This would lead to the conclusion that the court itself must in all cases be applied to, whereas, unless under special circumstances, letters of administration are granted by the registrars, with no other requisite than the usual affidavit and bond. On the same page we read, "the right of the executor is derived not from the probate but from the will." These words, it is true, are there used to show whence the executor derives his appointment as distinct from the source whence the administrator derives his; but any one not versed in such matters, would conclude the will *per se* clothed the executor with authority, whereas it is the probate does that. The will gives him an inchoate right to represent the testator, but it is the probate which completes it, and without which, as far as personalty is concerned, he can do nothing. But at page 388, it is more correctly said, "an executor derives all his authority from the testator, the probate only evidences his title. For this purpose, however, it is indispensable, and the will itself cannot be looked at in any case concerning personal estate." A little further on, at page 395, we read, "a dead man can have no next of kin;" an embarrassing statement to one who wishes for administration. But here again we find this statement practically contradicted at page 412; there we find it stated, "Failing the widow, those who at the death of the deceased were his next of kin are entitled to the grant."

These inconsistent statements appear to us to arise from the desire to amplify each subject-matter. Our authors, instead of confining themselves solely to the subject on which they would inform us, travel out of their path in search of some kindred or analogous matter, for the purpose of illustration, it may be truly said; but we conceive it would have been much better to have confined themselves to the matter in question; as, for example, when dealing with administration, not to have trenched on the appointment of executors. The obligation cast upon one of the authors of this volume, probably not very well acquainted with the procedure of the late Prerogative Court, *petere fontes potius quam rivulos sectari,*

has probably produced the amplification of which we complain, and which we repeat is out of place in a work on practice. Mr. Coote's "Practice of the Court of Probate" is alluded to in the preface. It is no part of our duty, and it is far from our wish, to make any comparison between that volume and the one before us, but we have accidentally discovered one important rule given in the former which we do not find in the latter. "If there be no next of kin, or the intestate be a bastard, one-half goes to the wife, and the other half to the Crown." (Coote's Pr., p. 78, 2nd. Ed.) We now close our remarks; they have been made in a candid impartial spirit, and it is but just that we should add that this book evidences much learning and research, and that it contains much valuable information which those who wish to inform themselves of the principles upon which the Court of Probate is founded, and the rules which guide it, would do well to consult.

A Treatise on the Law of Bills of Exchange, Promissory Notes, Bank Notes, and Cheques on Bankers. By Robert Thomson, Advocate. A New Edition, adapted to the Present State of the Law, by John Dove Wilson, Advocate. Edinburgh: T. & T. Clark. London: Stevens Sons & Haynes. Glasgow: J. Smith & Son. 1865.

For upwards of thirty years this has been as much the standard treatise upon the law of bills of exchange in Scotland, as the works of Chitty and Byles upon the same branch of law in England. This edition, to which Mr. Wilson has devoted an amount of labour worthy of his task, contains so many important additions and alterations, as to give to the work almost a new appearance. To some of these we invite the reader's attention. The edition of 1836, it must be admitted, was open to serious objections; not because the law was inaccurately stated, but because of the confusion which arose from the want of a judicious and logical arrangement of the subject-matter. The work was also overloaded with the reports of judicial decisions, which every Scotch lawyer knew to have been decided upon erroneous principles. Indeed, the learned author himself, after giving the full details of a case, frequently pointed out those very errors. Much embarrassment arose also from the heaping of long, though very accurate and learned notes, upon the text. To tell the truth, the work was exceedingly imperfect as regards the minor requirements of a text book, simplicity of method, facilities of reference, &c. &c. &c. Moreover, a considerable portion of what was good law thirty years ago, has become obsolete, and several points which were then doubtful, have long since been well established. The treatise had thus gradually become anachronous, and to a certain extent useless. Mr. Wilson has invested it with fresh merits, courageously stripping off from the original framework all that had become inoperative, and fitting in new and original matter,

so as to form a uniform and concrete whole. It is now a modern book, full of valuable information to the modern practitioner.

It might be mentioned that the paragraphs on the Stamp Laws, on Alterations, on Bank Cheques, on Bank Notes, Deposit Receipts, Letters of Credit, and on the Construction of Bills, have been entirely re-written by the author. It would appear that Mr. Wilson has proceeded upon the plan of incorporating all the footnotes of the former edition with the body of the work, wherever such notes contain the discussion of legal questions. This has the advantage of leaving the footnotes clear for simple references to the cases cited in illustration of the text, thereby obviating the interruption which the perusal of a long note extending over several pages necessarily entailed. We observe also that there has been a very judicious subdivision of the subject-matter into paragraphs of convenient length, and opposite each paragraph a rubric has been placed in the margin, indicating the subject of which it treats. The order of the paragraphs has also been changed in some instances, and several of the sections (which often treated of more than one subject) have been subdivided. "The editor has followed the plan of the original work, and has made copious use of those English authorities which were applicable to the law of Scotland. Occasionally, references have also been made to the laws of the United States of America, and of other foreign countries, where it was considered that they might throw light on points in our own law which were not firmly established, or which in any way required further elucidation."

The reading of this Treatise cannot fail to impress the mind of the English lawyer with the many and radical differences existing between the English and Scotch systems of law. Even in a department where one would naturally look for the nearest approach to uniformity—there being no special prejudices or matters of feeling to disturb the judgment—we find an entirely different procedure. Some of the peculiarities of the Scotch practice may be here alluded to with advantage. A Scotch bill of exchange corresponds to a bill of exchange in England, up to the time when the protest of the dishonoured security is completed. But at this point the two instruments have altogether a different significance. A Scotch bill, duly protested and duly registered, becomes a warrant of execution, both against the person and the goods of the debtor, while in England the creditor can only enforce his claim upon a bill of exchange by bringing an action and taking out execution. In every county throughout Scotland there is an office for the registration of protests. When a bill is returned dishonoured, the creditor, upon having the protest recorded in one of the registers, receives a precipe of the protest and a warrant of execution annexed thereto. Besides these county registries there is a metropolitan office where protests are received, not only from the county of Edinburgh, but from every place in Scotland. The warrants issued from the capital office are in force throughout the whole of Scotland, and execution may be obtained upon them in any county:

but the warrant issued from a local office is good only for the county in which the office is situated. Hence there is much less litigation on bills of exchange in Scotland than in England. It is quite competent, however, for the debtor upon a Scotch bill of exchange to move to stay execution: and here, generally speaking, litigation commences. The procedure is somewhat curious. The debtor, who in a case of this nature is called the "suspender," proceeds by what is called "a bill of suspension." This step having been taken, a judge inquires into the matter in the first instance, with a view to ascertain whether there is a *prima facie* case. The judge may summon the creditor—who is technically called "the charger,"—as well as "the suspender," and if no good reasons are shown why execution should be stayed, the bill is dismissed. On the other hand, if the preliminary inquiry disclose a meritorious defence, the case is allowed to proceed, and is eventually adjudicated upon after full trial. To prevent frivolous suits, the court will not permit the issue to be tried, unless the debtor shall bind himself, with one or more responsible securities, in a bond for the payment of debt and costs, should the final judgment be adverse to his claims. The creditor, who is thus made defendant in the suit upon the bill, is not bound to find surety for costs. The *onus probandi* lies upon the debtor, and the defendant has simply to take his stand upon the bill. In ordinary actions for debt, the creditor would have to make out his case as plaintiff, but in an action upon a bill of exchange he is in a better position, having only to rebut the plaintiff's case.

The statutes of limitation, or, to use the Scotch term—"of prescription" applicable to Scotch bills and debts generally—differ from ours in many respects. The term of limitation, or prescription, for the Scotch bill of exchange is six years from the time when payment is demandable, while the statutory prescription for an ordinary debt is only three years. There is another important distinction between the English and Scotch statutes of limitation. In England the expiration of the statutory period might be pleaded in bar in actions instituted for the recovery of the debt; but in Scotland it is not so. There the lapse of time only confines the plaintiff within certain prescribed and narrow limits in establishing his case. The limitations are, that the fact of the debt must be proved by the handwriting of the debtor, or of his representatives admitting the debt; or by the oath of the debtor or his representatives. The words of the statute are, "No bill of exchange, inland bill, or promissory note shall be of force, or effectual to produce any diligence or action in that part of Great Britain called Scotland, unless such diligence shall be raised and executed, or action commenced thereon, within the space of six years from and after the time at which the sums in the said bills or notes become exigible." It is further enacted, "that it shall and may be lawful and competent at any time after the expiration of the said six years, to prove the debts contained in the said bills and promissory notes, and that the same are resting owing by the oath or writ (writing) of the debtor."

There are two expressions in the clauses just cited which require explanation. It seems that the word "diligence" means, according to the phraseology of the English law, execution against a debtor's person or his goods and chattels. The curious phrase "rest owing" might be intelligibly and accurately construed as "continuing to be due."

With respect to the time from which prescription runs in regard to bills or notes payable at a fixed term, the rule of law in Scotland is that the statutory limit of six years commences to run from the last day of grace, or, if that day should happen to fall on a Sunday or holiday, it runs from the day preceding. Where a bill is made payable "on demand" the six years runs from the date of the instrument. In a bill payable "at sight" the point does not seem to be well fixed; but it would appear according to some authorities that the safest course is to hold that the six years commence to run from the date of presentment.

In order to commence an action for the purpose of interrupting prescription, it is not absolutely necessary that the holder of a bill should bring an action upon the bill. It is sufficient if he makes a demand on which judgment can be pronounced in his favour, though it were an action brought for his benefit, in common with other creditors. It has been judicially laid down, that the prescription of a bill is interrupted by the production of a bill and registered protest in a process of Banking Sale of the debtor's landed estate. It is also enough to lodge a bill or note with an affidavit, in the hands of a trustee in a sequestration. There is a further mode of interrupting a prescription, namely, by obtaining judgment within the statutory limit, against one of the acceptors of a bill. This implies that action has been "commenced" in terms of the statute; and it makes no difference whether the action be commenced against one of the parties only, or against all of them.

Those who may feel disposed to pursue the inquiry into the law relating to bills of exchange in Scotland, will find every information accurately and elaborately stated in this volume.

The Lunacy Acts. Containing all the Statutes relating to Private Lunatics, Pauper Lunatics, Criminal Lunatics, Commissions of Lunacy, Public and Private Asylums, and the Commissioners in Lunacy; with an introductory commentary; notes to the Statutes, including references to decided cases, and a copious index. By Danby P. Fry, Esq., of Lincoln's Inn, Barrister-at-Law, and of the Poor Law Board. London: Knight & Co. 1864.

UNTIL the great work of expurgating and consolidating the statute law shall have been completed, the profession cannot afford to dispense with the compilations of text writers. Fifty years ago there were very few manuals on the shelves of a lawyer's library. The

Statutes at large, the Reports, and some half a dozen standard treatises, all bound in calf, and labelled with uniform strips of scarlet and black morocco, constituted the whole stock in trade of the legal practitioner. The veterans of the profession even at the present day affect considerable pity for the young barrister whose library gleams with white-labelled text-books, and recommend a diligent study of the "original authorities," with as much dogmatism as a Waterloo hero descanting on the merits of Brown Bess. It so happens, however, that a good Enfield will kill more men in a given time than even Brown Bess; nor is it the less true, that our modern libraries afford far greater facilities for the acquirement of legal learning than those musty volumes which satisfied the wants of our forefathers. Since the Georgian era, the statute law has been expanding with marvellous rapidity; while the judges have succeeded in keeping a whole army of reporters fully occupied in recording their decisions. Without the aid of digests, manuals, leading cases, &c., &ç., &c., no practitioner could keep pace with this growing literature. The profession is indebted to Mr. Fry for placing at its disposal a work which will be found very useful in the administration of an important department of the law. The author has brought together all the statutes now in force which relate to the subject of lunacy, beginning with the first enactment, 17 Ed. II., st. 1. The work consists of a somewhat lengthy introduction, a synopsis of the Lunacy Acts, extracted for the most part in their entirety from the Statutes at large, several circular letters from Poor Law Boards to subordinate officers and public bodies in that department, and a minute index, extending over not less than 122 pages. The threefold division of lunatics into private lunatics, pauper lunatics, and criminal lunatics, has been adopted and adhered to by Mr. Fry, throughout the whole of his work. The same order is observed in the introduction as in the grouping of the statutes. This method is by no means free from objection, and, indeed, cannot possibly be in strictness carried out, for the simple reason that the statutes themselves have not been framed and classified upon that principle. The different branches of the subject are intermingled in the various Acts, and the author has evidently laboured under a great difficulty in arranging the statutes methodically according to the subject matter.

Mr. Fry does not profess to discuss the nice questions of ethics and psychology which constitute this, the most embarrassing and perhaps the most unsettled department of our jurisprudence. Having laid out for himself a much less ambitious task, he has shown good sense in confining himself strictly to his purpose. It is a complete and accurate collection of the Lunacy Acts—a private contribution towards the great work of consolidation; prepared with a view that it might serve as a manual for those who are engaged in the actual administration of this important branch of the law, "as well as for those who may be otherwise interested in the unhappy sufferers from the most terrible infliction to which humanity is subject. . . . . It has been the desire and study of the editor to

render the present volume practically useful to all who are in any way concerned or interested in these afflicted persons; whether as friends or relatives, or as members of the legal profession, or as justices of the peace, or as guardians of the poor, or parish or union officers, or as superintendents or proprietors of public or private asylums, or persons otherwise engaged in the management of these establishments, or in the care of the insane; or as members of the medical profession, who may be called upon at any moment to give certificates of insanity, as well as to undertake the care or to regulate the control of the insane, subject to legal, in addition to moral, responsibility."

Before concluding these observations we would invite the author's attention to the arrangement of the index. The fault we find with it is rather an unusual one. It is too elaborately done. We gather from the preface that Mr. J. C. Fluck, of the Poor Law Board, took a considerable share in the preparation of the index, and it must be admitted no labour has been spared to make this part of the work complete and exhaustive; 122 closely printed pages bear sufficient evidence of that. Indeed, so much has this part been laboured, that they have given us a very good analysis, but a very poor index. Refer, by way of illustration, to page 681, under the title of "Order of Lord Chancellor." Under that single reference we have a paragraph of not less than sixty lines, subdivided in such a manner as to make it impossible for the eye to catch any one indicated phrase. The same is true of the long paragraphs under the following titles—"Secretary of State," "Patients," "Pauper Lunatics," "Masters in Lunacy," "Hospitals," "Misdemeanours," and so forth. The first requirement of an index is, that it should indicate.

Pettigrew on the Presumption of Survivorship. London: Savill & Edwards. 1865.

QUESTIONS of disputed survivorship are happily rare; this, together with the difficulty of laying down general rules which would meet the great bulk of cases, accounts for the non-existence of any positive laws on the subject. Occasions however may arise, where the want of positive law would be productive of considerable loss to individuals. As, for instance, in the case of testator and legatee falling victims to the same accident, where the legacy would lapse or go to the executor of the legatee, according as he survived, or otherwise, &c. &c. There is a paper now before us on this subject, which appeared in the January number of the *British and Foreign Medico Chirurgical Review*, the work of a young Scotch surgeon, Dr. J. Bell Pettigrew, who has already begun to attract attention by his brilliant and original views on questions of anatomy. In this paper the author first advocates the necessity of positive laws on the question. Having glanced at the provisions of the Civil Law and Code Napoleon—the latter of which, though not without fault, he

considers to contain the most satisfactory existing settlement of the question—he proceeds to show this necessity by a reference to several remarkable cases on record where the issues were very uncertain, and so many specious arguments could be brought forward on each side of the question.

He then proceeds to consider the value of physical signs in determining questions of survivorship, and here he adopts a twofold division of his subject—considering first, the physiological and pathological laws which regulate life in its various forms; and, secondly, such as regulate death in its principal varieties; under the first head he considers the conditions of the body, where age and sex must be the natural criterions in deciding questions of survivorship; and here it may be said he discards the old septennary division of human life, and adopts instead a division into four periods, marked by well-defined bodily and mental changes. He then gives the outline of a code of laws to be adopted in such cases. Under the second division of his subject he goes on to consider the most obvious cases in which persons may perish within a short period of each other, as by poisoning, noxious inhalation, starvation, &c., &c., and points out many of the physiological principles and *post mortem* appearances which should guide in determining the question of survivorship. Such a paper as that of Dr. Pettigrew's must necessarily be suggestive rather than exhaustive, but should Dr. Pettigrew turn his attention further to the elucidation of the various unsettled questions of forensic medicine, we have no doubt from his ability and analytical tone of mind he would do much for the advancement of that branch of legal science.

The Acts for the Better Management of the Highways of England, 25 & 26 Vict., c. 61; 26 & 27 Vict., c. 61; 27 & 28 Vict., c. 101. With Introduction, Notes, and Index. By W. Cunningham Glen, Esq., Barrister-at-Law. Third Edition. London: Butterworths, and Knight & Co. 1864.

This collection of the Statutes relating to the management of highways, is an appropriate and useful supplement to Mr. Glen's well-known "Treatise on the Law of Highways." It has been prepared on precisely the same model as the work last referred to, and consists of a lengthy introduction—a mere paraphrase of the Acts of Parliament—followed by the Acts themselves, in their pure statutory diction. Considering that only eleven judicial decisions are cited, and not one of them in illustration of a single proposition in the said paraphrastic introduction, will the author forgive us for suggesting that, in future editions, it should be omitted altogether, or substituted by something really useful? It is difficult to understand what object the author had in view in writing out (for example) the paragraphs at pages 24, 36, 42, in almost the same words and same number of lines as the subsequent sections on pages 70, 122,

and 107. It would be quite easy to give a score of similar examples. Printers and bookbinders might possibly find arguments in favour of such a method, which purchasers would be very loath to accept. If a gentleman takes the trouble to put several correlate Acts of Parliament together in bookshape—and such collections are very useful—let it be done in a simple and straightforward way. Let there be no aping of authorship, involving payment for the same thing twice over.

With this qualification, we very cordially recommend this little volume. It is an accurate work, and may be safely consulted by those who shall have occasion to inform themselves as to the statutory provisions relating to the management of highways.

An Elementary View of the Proceedings in a Suit in Equity, with an Appendix of Forms. By Sylvester Joseph Hunter, Esq., B.A., of Lincoln's Inn, Barrister-at-Law. Third Edition, by George Woodford Lawrance, M.A., of Lincoln's Inn, Barrister-at-Law. London : Butterworths. 1865.

THE treatises upon the principles and practice of equity are numerous, and almost without exception, good. Drewry, Ayckbourn, Spence, Goldsmith, and other authors equally eminent as equity lawyers, have won for themselves a high reputation, and have conferred upon the profession a great obligation by their valuable works. Notwithstanding this formidable rivalry, however, Mr. Hunter's "Suit in Equity," which was first published in 1858, has been able to maintain its ground, and even to gain a considerable hold upon the esteem of the legal profession. It has been for several years one of the standard manuals in which candidates for the bar have been examined by the Reader in Equity. The first edition bore the modest announcement that "this little book made no pretension to the character of a complete treatise." It was prepared, said the author, merely to give to the student, in commencing his preparation for practice in the Court of Chancery, a short view of the nature of the business which would come before him in a solicitor's office, or in the chambers of an equity draftsman. The "little book," however, had been prepared with so much precision, accuracy, and fidelity to its purpose, that it soon became a very popular manual. Mr. Hunter having since retired from the law, and adopted another profession the work of preparing the second edition, which it became necessary to issue in 1862, fell into able hands. Mr. G. Woodford Lawrance has continued to edit the work, and has considerably added to its original value by well-chosen references to authorities, and instructive comments upon the several consolidated orders of the Court of Chancery which have been issued since the first publication of Mr. Hunter's book.

The procedure of that Court has of late years been shifting

and varied. New rules have been promulgated, new orders have been issued, and the Court itself has been invested with new powers. All these alterations have been embodied in the present edition. Future changes may perhaps create a demand for future editions, but the profession will be quite satisfied if the same amount of care and ability will be bestowed upon them as Mr. Lawrance has given to the third edition.

Outlines of Equity, being a Series of Elementary Lectures on Equity Jurisdiction, delivered at the request of the Incorporate Law Society, with Supplementary Lectures on Certain Doctrines of Equity. By Freeman Oliver Haynes, of Lincoln's Inn, Barrister-at-Law, and late Fellow of Caius College, Cambridge. Second Edition. London: Maxwell. 1865.

We heartily agree with the author "that, while a voluminous treatise alarms a beginner, a condensed manual, containing often in a single sentence the abstract result of a mass of decisions, is beyond his strength," and we think that he may be congratulated upon having supplied, what in the preface to this the second edition of his work, he terms, "a real need on the part of students beginning their law reading, for accurate information respecting equity, conveyed in a less condensed form than is commonly adopted by elementary treatises."

The main body of the book consists of a course of Elementary Lectures on Equity Jurisdiction, delivered to law students at the request of the Incorporated Law Society. In these the subject is treated historically, a method upon which the author justly lays great stress. The third lecture, in which he gives a general outline of a suit in equity, and takes an imaginary suit and traces it out to the decree, forms a good introduction to the lectures on the Principal heads of Equity Jurisdiction. This part of the subject he has classified according to the Exclusive Jurisdiction, Concurrent Jurisdiction, and Auxiliary Jurisdiction of the Court. There is considerable force in the reasons assigned in favour of this classification, instead of that (sometimes adopted) which is based upon the nature of the remedies given by the Court, viz., that it has an immediate tangible connection with the history of the subject itself, and draws attention to that which is in practice the most important question, viz., whether there is any relief at all in equity, and if there is, whether any and what relief can be obtained in any other court. Indeed, it must be evident that no satisfactory and sound knowledge of the principles and limits of equity jurisprudence can be acquired, without tracing out its origin and growth, and comparing it with the principles and jurisdiction of other courts. Take any subject of equity jurisdiction you will, and you will find that you will fail to gain an accurate working knowledge of it till you have ascertained the deficiencies in the jurisdiction of the other courts which led to its

assumption, the order and variations of the decisions relating to it, and the later doctrines of the other courts in relation to it. And though this consideration of the subject will in some measure involve an inquiry into the nature and operation of the appropriate equitable remedies (to which the practitioner indeed must pay particular attention); yet in a work for students the author has, we think, chosen very wisely in adopting this historic and comparative method. A perusal of the book will show with what clearness the doctrines of equity can thus be treated, and (what is of no small importance in a student's book) with what interest they can be invested. The author has added to this edition four supplementary lectures upon some particular subject of equity jurisprudence. With regard to these, and to some of the other lectures, it appears to us, however, that he has departed somewhat from his "outline," and that either the remaining lectures ought to have been fuller, or these ought to have been less elaborate or more numerous. Thus, for instance, it is difficult to see why an "outline" should treat rather scantily of fraud, which is one of the most common and important grounds of suit in equity, and should deal more fully with the doctrines of election and satisfaction. The Appendix containing Mr. Barber's statement of the Practice and Procedure of the Court of Chancery in England, which was appended to the First Report (1863) of the "English and Irish Law and Chancery Commission," will be found to be a useful summary.

A Manual of the Practice of Conveyancing; showing the present practice relating to the daily routine of Conveyancing in Solicitors' Offices. To which are added concise Common Forms and Precedents in Conveyancing; Conditions of Sale, Conveyances, and and all other Assurances in Common Use. Third Edition. Revised and considerably enlarged. By G. W. Greenwood, Solicitor, and Henry Horwood. London: Stevens, Sons, & Haynes. 1865.

It is evident that the Act for the registry of land and the expensive machinery created by it has not yet much interfered with the practice of conveyancing, whatever other good results it may have effected. Here we have a work on the mere practice of conveyancing, which has just reached a third edition. There are many of the practical duties of a solicitor which the generality of the works upon conveyancing do not touch, or which they detail too elaborately for a beginner. What an articled clerk or a young solicitor requires, is a book which will instruct him upon the ordinary office work connected with conveyancing. We lately heard of a gentleman, just commencing practice in the country, who had made a will for a client, and wrote up to his London agent asking what he was to do next. The answer was to make friends with the executors.

It is to be hoped there are not many young practitioners so ignorant as this one. It is to be expected that they will have been better taught their duties in some London office. But in learning those duties, and upon commencing business, a brief summary of the ordinary practice, pointing out the course to be pursued, and the advice to be given to a client according to the circumstances, is extremely useful. The work before us seems well adapted (as its success would imply) to meet such want. It seems to be clearly and pleasantly written, and the matters selected seem well chosen and judiciously treated. Of course in cases of any difficulty or uncommon occurrence more detailed works must be consulted.

We might be disposed, however, sometimes to doubt the soundness of the author's advice when he advances from the routine of the office to the task of drawing conveyances. Thus his remarks at p. 32, as to the recitals in purchase deeds, seem not to have been founded on a clear notion of the operation of recitals by way of estoppel, or in making plain and explicit the scope of the testatum. Nor can we always approve of his endeavours after conciseness. For instance, it would appear that the form adopted by him in covenants for title "that (notwithstanding any act or thing by him the said vendor to the contrary) he the said vendor now hath, &c." has only attained brevity at the expense of clearness. For, does the covenant apply to things *done* by him, or to those permitted by him, or to which he has been party or privy? Here would be a pretty seed plot for lawsuits. The omission, also, of the covenant for quiet enjoyment, which is the covenant most generally sued on, does not seem expedient. At any rate, we should have preferred having some reasons assigned for the author's departures from the common practice, We might then have placed more confidence in the precedents, and certainly the work would have been more useful to the student. There is, however, a considerable variety of precedents of conveyances and conveyancing forms, which may be useful to one who has learnt their proper use as helps and not as guides.

A Treatise on Costs in Chancery, by George Osborne Morgan, M.A. Barrister-at-law, late Stowell Fellow of University College, Oxford, and Eldon Fellow; and Horace Davey, M.A., Barrister-at law, late Fellow of University College, Oxford, and Eldon Scholar. With an Appendix containing Forms and Precedents of Bills of Costs. London: Stevens Sons & Haynes. 1865.

It is needless to insist on the use of a work which treats properly the subject of costs in Chancery. The question of the costs is often one of the most important bones of contention between the parties to a suit, as the inexperienced practitioner will often be surprised to discover. A junior counsel will perhaps find it as useful and as satisfactory to his client to pay attention to this question, and be ready to back up his leader and assist him with authorities relating

to it, as to have mastered the merits and law of the case. At the same time there is no modern work which will enable him to discharge this duty. There are many works which incidentally, and in a fragmentary way, treat of costs, but the labour of collecting the law and cases upon the whole subject needed to be done. To a solicitor it is a work of supererogation to point out the value of such a work. The authors of this book seem to have devoted a great deal of attention and labour to its compilation, and the arrangement of the work seems to be very satisfactory, being both natural and easy of reference—no mean merit, considering how extremely difficult it is so to arrange as to embrace the whole subject without confusion and endless cross divisions. And it is impossible not to concur in our authors' remarks, "The necessity for a treatise like the present is illustrated, and, it may be added, the difficulty of preparing the present work has been increased by the conflicting character of many of the reported decisions. The question of costs is in most cases left till the principal points in the case are decided, and is then disposed of, often without argument, and sometimes without reference to any general principles." It is only to be hoped that the collection and collating of the reported decisions in this work may be a first step towards introducing uniformity into the practice as to costs in various suits and cases, by causing it to be based upon common and common sense principles. It would be impossible to do justice to the work in detail. On the occasions we have had to consult it we have been able easily to find the very point we were in search of. The authors appear to have been anxious to do their utmost to give us the latest cases, and Mr. Morgan's name is a guarantee that the work has been conscientiously executed. But in a work of such a size and complexity it is, of course, inevitable that mistakes and omissions should occur in the first edition, and we had noted one or two, to which, however, the references so painfully gathered by the authors would prove a corrective. Thus, for instance, at p. 264 we find it stated that a party ought not to be allowed to sue to redeem in *forma pauperis*, Fowler *v.* Davies 16 Sim. 182, a statement which the case of Parkinson *v.* Chambers 3 W. R. 343 quoted in the same paragraph would have corrected. And at p. 2 we find to the effect that costs, charges, and expenses will not be allowed to trustees, &c., without express mention in the decree, or under the direction for "just allowances;" and it would have been useful to have added that "just allowances" will now be made without any express direction. Morg. Ch. Acts. 474.

We could have wished too, that the authors had sometimes given us a little more of the reasons of the law. Thus, in the passage last referred to, we find that the reason why trustees, &c., are not allowed costs, charges, and expenses, properly incurred in the execution of their trust without mention to the court and an express direction in the decree is not given. But on referring to the parallel passage in "Seton on Decrees," p. 768, the ground of the rule

is stated to be, that they are supposed to have retained such sums; and the rule then seems fair and is impressed upon the understanding, whilst a step towards settling the general laws of costs on principle is attained. Still it must in fairness be admitted that the insertion of such matters as we have alluded to, might have rendered the work too bulky and unwieldy. But we have no doubt the book will become a standard one, and trust that if possible the authors will in a subsequent edition pay greater attention to the "reason of the law."

The following works have been received, and will be noticed in our next number:—

1. A Digest of Moohummudan Law on the Subjects to which it is usually applied by British Courts of Justice in India. Compiled and Translated from Authorities in the Original Arabic, with an Introduction and Explanatory Notes. By Neil B. E. Baillie, Member of the Royal Asiatic Society, Assistant-Secretary to the Indian Law Commission, and formerly Government Pleader in the Court of Sudder Dewanny Adawlut, and an Attorney of the Supreme Court of Judicature at Fort William, in Bengal. London: Smith & Co. 1865.
2. A Treatise on the Law Relating to Bankers and Banking. By James Grant, M.A., of the Middle Temple, Esq., Barrister-at-Law. Second Edition. By R. A. Fisher, Esq., of the Middle Temple, Barrister-at-Law. London: Butterworths. Dublin: Hodges, Smith, & Co. 1865.
3. The Penal Code of the State of New York. Reported Complete by the Commissioners of the Code. Albany: Weed, Parsons, & Co. 1865.
4. Tabula Curiales, or Tables of the Superior Courts of Westminster Hall, showing the Judges who sat in them from 1066 to 1864, with the Attorneys and Solicitors-General of each Reign from the Institution of those Offices. To which is prefixed an Alphabetical List of all the Judges during the same Period; Distinguishing the Reigns in which they flourished, and the Courts in which they sat. By Edward Foss, F.S.A., of the Inner Temple, Author of the "Judges of England." London: John Murray. 1865.

Transactions of the National Association for the Promotion of Social Science. York Meeting. London: Longmans & Co. 1865.

PAMPHLETS, &c.

Clerical Disabilities. A short account of the law thereon. By W. T. Marriott, Esq., of Lincoln's Inn, Barrister-at-Law. London: Longman, Green, Longman, Roberts & Green. 1865.

THE validity of Mr. Lascelles' call to the Bar, by the Benchers of the Inner Temple, was affirmed by the recent decision of the Benchers of the several Inns of Court, pronounced on Tuesday, the 7th of February last. It will be remembered that Mr. Lascelles had been an ordained clergyman of the Church of England, had renounced his preferment, and been admitted into the Church of Rome. He was called to the Bar in June, 1864, and upon the question being raised by some of the Benchers of the Inner Temple as to the validity of the call, a conference of the Benchers of the four Inns of Court was convened. Their decision, that for the future, no clergyman should be disqualified from being called to the Bar, by reason of his having taken Holy Orders, directly overrules the rule laid down in Horne Tooke's case. In that case the Benchers of the Inner Temple adopted the following resolution—"Mr. Treasurer Bower, Mr. Reade having this day reported to the Bench Table that they have met and conferred with the following Benchers of the other Inns of Court—namely, Peter Holford and John Foley, of Lincoln's Inn, Esqrs., and Master Wynne and Master Whitechurch of the Middle Temple, and Alan Chambre, Esq. and Dr. Fisher of Gray's Inn—on the question,—Whether a person in deacon's orders, being admitted, and having kept his terms, may be called to the Bar?—and that on the said conference it was the opinion of all the said deputies of the four Inns of Court, that a person in deacon's orders ought not to be called to the Bar; it is therefore resolved by the Masters of the Bench now present, that a person in deacon's orders ought not to be called to the Bar."

The subject of clerical disabilities having again come before the profession and the public, the excellent pamphlet now before us will no doubt be read with considerable interest. Mr. Marriott illustrates the various restrictions imposed by the English law upon the clergy, as regards secular pursuits, in the course of a historical inquiry which, although not exhaustive, is both accurate and comprehensive. The restrictions attaching to a person who has taken orders in the Church are, according to the author, the following. 1. He cannot so divest himself of his orders as to be exempt from any liabilities to which he became amenable at ordination, except in certain cases specially protected by statute. 2. He cannot trade or farm except within certain limits, without being guilty of a breach of ecclesiastical discipline. 3. He cannot be elected a member of the House of Commons. 4. Should he become a priest in the church of Rome, a minister in any body of nonconformists, or a member of any of the learned professions, he will remain subject to his Church of England bishop in matters ecclesiastical.

Mr. Marriott proposes to emancipate the clergy from all civil disabilities, taking his stand on the principle, that the law of the Church should bind her own voluntary members only, and should not extend to those who quit, or who are expelled from, her communion. The absurdity of holding a man bound for ever, by a confession of faith and religious vows undertaken when a mere youth, can scarcely be better shown than in the irresistible logic of this pamphlet. In discussing the propriety of making ex-priests and deacons competent to be parliamentary representatives, the author does not appear to take into account the dangerous use into which the sacred office of the ministry might be turned during the tenure of Holy Orders, with a view to subsequent political influence. It cannot be denied that ministers of religion have special opportunities and special modes of influencing the community. Such influence, when directed to the promotion of religious culture, is not only justifiable but of the highest value. To employ that acquired influence for secular purposes might turn out most mischievous, and prove fatal to liberty and independence. This is specially true as regards the dissenting clergy, who, as a rule, hold the laity over whom they have attained influence by a much more powerful grasp than the clergymen of the Established Church. The possible abuse of such a power ought to be taken into consideration before deciding that a minister of to-day may issue an address to a constituency, consisting principally of the members of his late congregation.

Mr. Marriott has successfully grappled with the ordinary arguments in favour of closing all secular pursuits against the clergy. His reasoning is temperate and fair: the authorities have been cited with accuracy; and the work has been apparently performed with a sincere desire to remove what the author feels to be a pressing evil.

Further Suggestions for a Public Code. By Robert M. Heron, Esq., of the Inner Temple, Barrister-at-Law. London: Hatchard & Co. 1865.

THESE suggestions are dedicated to the Lord Chancellor. The distinction between a digest and a code is very clearly pointed out, and the arguments in favour of adopting the latter in preference to the former are very well set forth. Mr. Heron has evidently mastered the subject, and all his observations are entitled to the best consideration of all law reformers.

Theatres *versus* Music Halls. What is a Stage Play? With a Word on the Players. By J. Kinghorn, Esq., Barrister-at-law. London: The News Agents' Publishing Company. 1865.

THIS *brochure*, written with more gaiety of spirit than is usual in any production which at all savours of law, contains a short sketch of the statute and case law relating to dramatic representations, and a discussion of the present misunderstanding between theatrical

managers and the proprietors of music halls. Several cases are (Scotch as well as English) cited at some length; but from the fact that the references to the reports are not given in full, we imagine that the paper has not been propounded so much for the legal profession as for the public. The author is in favour of affording greater facilities to the proprietors of music halls, to obtain licences for acting stage plays, &c. "The whole thing," says the author "amounts to this,—is protection to be the ruling principle of our theatres, or is there to be free trade in them? If things are to remain in their present condition, the music halls may, for all practical purposes, shut up to-morrow. It is quite clear that there is scarcely any amusement that they can provide which does not subject them to a penalty and a prosecution. . . . We see no valid reason why greater obstacles should stand in the way of a man's getting a licence for stage plays, than in the case of a music licence, so long as the establishment is conducted in an orderly manner."

In the preparation of this paper, the author has thought fit to adopt a light bantering style, which sometimes comes down to the level of slang. This may be all very well and very proper, if his object was as much to amuse as to instruct. We must be forgiven for suggesting that the subject is capable of being treated in a much more comprehensive and useful manner. The law upon this subject has not yet been compiled and methodically arranged with the research and learning of which the subject is worthy. The author having a special class of readers in view, has probably acted with discretion, in interspersing the arguments with quaint allusions and comic hits. We trust, however, that Mr. Kinghorn, or some one else who may have devoted attention to the subject, would favour the profession with a clear, concise, and exhaustive treatise upon this almost unknown department of law. The best text-book we have as yet seen upon this subject is an anonymous work, bearing the following title—"A Handy-book of the Law of the Drama and Music," and published by Mr. Lacy, the theatrical publisher of the Strand. The Handy-book treats of dramatic copyright, copyright in musical compositions, dramatic copyright in music, and international copyright in the drama and music; the law for licensing and regulating theatres; and the law relating to licences for music and dancing; and professional engagements, with the statutes, forms, &c., referring thereto. Though it has been compiled with considerable care and good judgment, it is capable of improvement in several particulars. Should the author of this anonymous work be disposed to issue another and a larger edition, he may derive some advantage from perusing the paper of Mr. Kinghorn.

Events of the Quarter.

CASE OF THE BISHOP OF NATAL.

The following is the judgment of the Lords of the Judicial Committee of the Privy Council upon the Petition of the Lord Bishop of Natal, referred to the Judicial Committee by Her Majesty's Order of June 10, 1864; delivered March 20, 1865.

Present; Lord Chancellor, Lord Cranworth, Lord Kingsdown, Dean of the Arches, Master of the Rolls.

The Bishop of Natal and the Bishop of Cape Town (who are the parties to this proceeding) are ecclesiastical persons who have been created bishops by the Queen, in the exercise of her authority as Sovereign of this realm and Head of the Established Church.

These bishops were consecrated under mandate from the Queen by the Archbishop of Canterbury, in the manner prescribed by the law of England.

They received and hold their dioceses under grants made by the Crown. Their status, therefore, both ecclesiastical and temporal, must be ascertained and defined by the law of England; and it is plain that their legal existence depends on acts which have no validity or effect, except on the basis of the supremacy of the Crown.

Further, their respective and relative rights and liabilities must be determined by the principles of English law applied to the construction of the grants to them contained in the letters patent; for they are the creatures of English law, and dependent on that law for their existence, rights, and attributes.

We must treat the parties before us as standing on this foundation, and on no other.

The letters patent by which Dr. Gray was appointed Bishop of Cape Town and also Metropolitan, passed the Great Seal on December 8, 1853. These letters patent recited, among other things, that it had "been represented to Her Majesty by the Archbishop of Canterbury that the then existing see or diocese of Cape Town was of inconvenient extent, and that for the due spiritual care and superintendence of the religious interests of the inhabitants thereof, and for the maintenance of the doctrine and discipline of the United Church of England and Ireland within the colony of the Cape of Good Hope and its dependencies, and the island of St. Helena, it was desirable and expedient that the same should be divided into three (or more) distinct and separate sees or dioceses, to be styled the Bishopric of Cape Town, the Bishopric of Graham's Town, and the Bishopric of Natal—the bishops of the said several sees of Gra-

ham's Town and Natal and their successors to be subject and subordinate to the see of Cape Town and to the bishop thereof and his successors, in the same manner as any bishop of any see within the province of Canterbury was under the authority of the archiepiscopal see of that province and the archbishop of the same;" and the letters patent contained the following passages:—

"And we do further will and ordain that the said Right Reverend Father in God, Robert Gray, Bishop of the said see of Cape Town, and his successors the bishops thereof for the time being, shall be and be deemed and taken to be the metropolitan bishop in our colony of the Cape of Good Hope and its dependencies, and our island of Saint Helena, subject nevertheless to the general superintendence and revision of the Archbishop of Canterbury for the time being, and subordinate to the archiepiscopal see of the province of Canterbury: and we will and ordain that the said Bishops of Graham's Town and Natal respectively shall be suffragan bishops to the said Bishop of Cape Town and his successors. And we will and grant to the said Bishop of Cape Town and his successors full power and authority as metropolitan of the Cape of Good Hope, and of the island of Saint Helena, to perform all functions peculiar and appropriate to the office of metropolitan within the limits of the said sees of Graham's Town and Natal, and to exercise metropolitan jurisdiction over the bishops of the said sees and their successors, and over all archdeacons, dignitaries, and all other chaplains, ministers, priests, and deacons in holy orders of the United Church of England and Ireland within the limits of the said dioceses. And we do by these presents give and grant unto the said Bishop of Cape Town and his successors full power and authority to visit once in five years, or oftener if occasion shall require, as well the said several bishops and their successors, as all dignitaries and other chaplains, ministers, priests, and deacons in holy orders of the United Church of England and Ireland resident in the said dioceses, for correcting and supplying the defects of the said bishops and their successors, with all and all manner of visitorial jurisdiction, power, and coercion.

"And we do hereby authorise and empower the said Bishop of Cape Town and his successors to inhibit during any such visitation of the said dioceses the exercise of all or of such part or parts of the ordinary jurisdiction of the said bishops or their successors as to him the said Bishop of Cape Town or his successors shall seem expedient, and during the time of such visitation to exercise by himself or themselves, or his or their commissaries, such powers, functions, and jurisdictions, in and over the said dioceses, as the bishops thereof might have exercised if they had not been inhibited from exercising the same.

"And we do further ordain and declare that if any person against whom a judgment or decree shall be pronounced by the said bishops or their successors, or their commissary or commissaries, shall conceive himself to be aggrieved by such sentence, it shall be lawful

for such person to appeal to the said Bishop of Cape Town or his successors, provided such appeal be entered within fifteen days after such sentence shall have been pronounced.

"And we do give and grant to the said Bishop of Cape Town and his successors full power and authority finally to decree and determine the said appeals.

"And we do further will and ordain that in case any proceedings shall be instituted against any of the said bishops of Graham's Town and Natal, when placed under the said metropolitical see of Cape Town, such proceedings shall originate and be carried on before the said Bishop of Cape Town, whom we hereby authorise and direct to take cognisance of the same. . . .

"And if any party shall conceive himself aggrieved by any judgment, decree, or sentence pronounced by the said Bishop of Cape Town or his successors, either in case of such review or in any cause originally instituted before the said bishop or his successors, it shall be lawful for the said party to appeal to the said Archbishop of Canterbury or his successors, who shall finally decide and determine the said appeal."

The letters patent which constituted the see of Natal and appointed the appellant to that see, were sealed and bear date on the 23rd November, 1853, fifteen days before the grant of the letters patent to the Bishop of Cape Town.

The letters patent creating the see of Natal recited the patent of September, 1847, which created the original diocese of Cape Town, and appointed Dr. Gray the bishop thereof, and that he had since resigned the office of Bishop of Cape Town, whereby the said see had become and was then vacant. The patent also recited that it was expedient and desirable that the said diocese should be divided into three or more distinct and separate dioceses, to be styled the bishoprics of Cape Town, Graham's Town, and Natal, the bishops of the said several sees of Graham's Town and Natal to be subject and subordinate to the see of Cape Town, and the bishop thereof, and his successors, in the same manner as any bishop of any see within the province of Canterbury was under the authority of the archiepiscopal see of that province and the archbishop of the same; and the letters patent proceeded to erect, found, make, ordain, and constitute the district of Natal, to be a distinct and separate bishop's see and diocese, to be called the bishopric of Natal. And after appointing Dr. Colenso to be the bishop of the said see, and granting that the said Bishop of Natal and his successors should be a body corporate, the letters patent contained the following passage:—

"And we do further ordain and declare that the said Bishop of Natal and his successors shall be subject and subordinate to the see of Cape Town, and to the bishop thereof and his successors, in the same manner as any bishop of any see within the province of Canterbury, in our kingdom of England, is under the authority of the

archiepiscopal see of that province, and of the archbishop of the same: and we do hereby further will and ordain that the said John William Colenso, and every bishop of Natal, shall, within six months after the date of their respective letters patent, take an oath of due obedience to the Bishop of Cape Town for the time being, as his metropolitan, which oath shall and may be ministered unto him by the said archbishop, or by any person by him duly appointed or authorised for that purpose."

The letters patent then proceeded to confer on the Bishop of Natal and his successors episcopal jurisdiction and authority over all rectors, curates, ministers, chaplains, priests, and deacons within the diocese, and directed that, if any party should conceive himself aggrieved by any judgment, decree, or sentence pronounced by the Bishop of Natal or his successors, he should have an appeal to the Bishop of Cape Town, who should finally decide and determine the appeal.

Under these letters patent, the appellant was consecrated on the 30th November, 1853, and he took an oath of canonical obedience to the Metropolitan Bishop of Cape Town, which oath was administered to him by the Archbishop of Canterbury, and was in these words:— "I, John William Colenso, Doctor in Divinity, appointed Bishop of the see and diocese of Natal, do profess and promise all due reverence and obedience to the Metropolitan Bishop of Cape Town and to his successors, and to the Metropolitan Church of St. George, Cape Town." At this time there was not in reality any metropolitan see of Cape Town, or any bishop thereof, in existence.

These several letters patent were not granted in pursuance of any orders or order made by Her Majesty in Council, nor were they made by virtue of any statute of the Imperial Parliament, nor were they confirmed by any Act of the Legislature of the Cape of Good Hope or of the legislative council of Natal.

Previously to these letters patent being granted, the district of Natal had been erected into a distinct and separate Government; and, by letters patent granted by the Crown, in 1847, it was ordained that it should have a legislative council, which should have power to make such laws and ordinances as might be required for the peace, order, and good government of the district. With respect to the Cape of Good Hope, by letters patent, dated May 23, 1850, it was declared and ordained by Her Majesty that there should be within the settlement of the Cape of Good Hope a parliament, which should be holden by the governor, and should consist of the governor, a legislative council, and a house of assembly, and that such parliament should have authority to make laws for the peace, welfare, and good government of the settlement.

In the year 1863, certain charges of heresy and false doctrine were preferred against the appellant before the Bishop of Cape Town as metropolitan, and, upon these charges, the Bishop of Cape Town, claiming to exercise jurisdiction as metropolitan, did, on the 16th day of December, 1863, sentence, adjudge, and decree the

appellant, the Bishop of Natal, to be deposed from his office as such bishop, and to be further prohibited from the exercise of any divine office within any part of the metropolitan province of Cape Town. In pronouncing this decree, the Bishop of Cape Town claimed to exercise jurisdiction as metropolitan by virtue of his letters patent, and of the office thereby conferred on him, and as having thereby acquired legal authority to try and condemn the appellant; and the appellant protested against such assumption of jurisdiction.

This sentence and decree of Dr. Gray as metropolitan has been published and promulgated in the diocese of Natal, and the clergy of that diocese have been thereby prohibited from yielding obedience to the appellant as Bishop of Natal.

In this state of things three principal questions arise, and have been argued before us. First: were the letters patent of the December 8, 1853, by which Dr. Gray was appointed metropolitan, and a metropolitan see or province was expressed to be created, valid and good in law? Secondly: supposing the ecclesiastical relation of metropolitan and suffragan to have been created, was the grant of coercive authority and jurisdiction expressed by the letters patent to be thereby made to the metropolitan valid and good in law? Thirdly: can the oath of canonical obedience taken by the appellant to the Bishop of Cape Town, and his consent to accept his see as part of the metropolitan province of Cape Town, confer any jurisdiction or authority on the Bishop of Cape Town by which this sentence of deprivation of the bishopric of Natal can be supported?

With respect to the first question, we apprehend it to be clear, upon principle, that after the establishment of an independent legislature in the settlements of the Cape of Good Hope and Natal, there was no power in the Crown by virtue of its prerogative (for these letters patent were not granted under the provisions of any statute) to establish a metropolitan see or province, or to create an ecclesiastical corporation whose status, rights, and authority the colony could be required to recognise.

After a colony or settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that colony or settlement as it does to the United Kingdom.

It may be true that the Crown as legal head of the Church has a right to command the consecrecation of a bishop, but it has no power to assign him any diocese, or give him any sphere of action within the United Kingdom. The United Church of England and Ireland is not a part of the constitution in any colonial settlement, nor can its authorities or those who bear office in it claim to be recognised by the law of the colony, otherwise than as the members of a voluntary association.

The course which legislation has taken on this subject, is a strong proof of the correctness of these conclusions. In the year 1813 it was deemed expedient to establish a bishopric in the East Indies (then under the government of the East India Company), and

although the bishop was appointed and consecrated under the authority of the Crown, yet it was thought necessary to obtain the sanction of the Legislature, and that an Act of Parliament should be passed to give the bishop legal status and authority. Accordingly, by Statute 53 Geo. III., c. 155, s. 49, it was enacted that in case it should please His Majesty by His Royal letters patent to erect, found, and constitute one bishopric for the whole of the British territories in the East Indies and parts therein mentioned, a certain salary should be paid to the bishop by the East India Company, and by the 51st and 52nd sections it was enacted that such bishop should not have or use any jurisdiction, or exercise any episcopal functions whatsoever but such as should be limited to him by letters patent, and that it should be lawful for His Majesty by letters patent to grant to such bishop such ecclesiastical jurisdiction and the exercise of such episcopal functions within the East Indies and parts aforesaid as His Majesty should think necessary for administering holy ceremonies, and for the superintendence and good government of the ministers of the Church establishment within the East Indies and parts aforesaid. Subsequently, in the year 1833, it was deemed right to found two additional bishoprics, one at Madras and the other at Bombay, and again an Act of Parliament (3 & 4 Wm. IV., c. 86) was passed, by the 93rd section of which it was enacted in like manner that the Crown should have power to grant to such bishops within their dioceses ecclesiastical jurisdiction; and it was also enacted and declared that the Bishop of Calcutta should be metropolitan in India, and should have as such all such jurisdiction as the Crown should by letters patent direct, subject, nevertheless, to the general superintendence and revision of the Archbishop of Canterbury; and it was provided that the Bishops of Madras and Bombay should be subject to the Bishop of Calcutta as metropolitan, and should take an oath of canonical obedience to him.

So again, when in 1824 a bishop was appointed in Jamaica by letters patent containing clauses similar to those which are found in the letters patent to the present appellant, it was thought necessary that the legal status and authority of the bishop should be confirmed and established by an Act of the colonial legislature. The consent of the Crown was given to this colonial Act, which would have been an improper thing, as an injury to the Crown's prerogative, unless the law advisers of the Government had been satisfied that the colonial statute was necessary to give full effect to the establishment of the bishopric.

The conclusion is further confirmed by observing the course of imperial legislation on the same subject, namely, the creation of new bishoprics in England.

When four new bishoprics were constituted by Henry VIII., it appears to have been thought necessary, even by that absolute monarch, to have recourse to the authority of Parliament, and the Act that was passed (viz., the 31 Henry VIII., cap. 9, which is not

found in the ordinary edition) is of a singular character. After referring to the slothful and ungodly life which had been used among all those which bore the name of religious folk, and reciting that it was thought, therefore, unto the King's Highness most expedient and necessary that more bishoprics, collegiate and cathedral churches should be established, it was enacted that His Highness should have full power and authority from time to time to declare and nominate by his letters patent or other writing to be made under his Great Seal, such number of bishops, such number of cities, sees for bishops, cathedral churches and dioceses by metes and bounds, for the exercise and ministration of their episcopal offices and administration as shall appertain, and to endow them with such possessions after such manner, form, and condition as to his most excellent wisdom shall be thought necessary and convenient.

This statute, which was repealed by the 1 & 2 Philip and Mary, c. 8, s. 18, does not appear to have been revived. It is remarkable as granting power to nominate and appoint new bishops as well as to create new sees and dioceses.

So also in recent times the two new bishoprics of Manchester and Ripon were constituted, and the new bishops received ecclesiastical jurisdiction, under the authority of an Act of Parliament. It is true that it has been the practice, for many years, to insert in letters patent creating colonial bishoprics, clauses which purport to confer ecclesiastical jurisdiction; but the forms of such letters patent were probably taken by the official persons who prepared them from the original forms used in the letters patent appointing the East Indian bishops, without adverting to the fact that such last-mentioned letters patent were granted under the provisions of an Act of Parliament.

We therefore arrive at the conclusion that although in a Crown colony, properly so called, or in cases where the letters patent are made in pursuance of the authority of an Act of Parliament (such, for example, as the Act of 6 & 7 Vict., c. 13), a bishopric may be constituted and ecclesiastical jurisdiction conferred by the sole authority of the Crown, yet that the letters patent of the Crown will not have any such effect or operation in a colony or settlement which is possessed of an independent legislature.

The subject was considered by the Judicial Committee in the case of *Long* v. *the Bishop of Cape Town*, and we adhere to the principles which are there laid down.

The same reasoning is of course decisive of the second question, whether any jurisdiction was conferred by the letters patent. Let it be granted or assumed that the letters patent are sufficient in law to confer on Dr. Gray the ecclesiastical status of metropolitan, and to create between him and the Bishops of Natal and Graham's Town the personal relation of metropolitan and suffragan as ecclesiastics, yet it is quite clear that the Crown had no power to confer any jurisdiction or coercive legal authority upon the metropolitan over the suffragan bishops, or over any other person.

It is a settled constitutional principle or rule of law, that although the Crown may by its prerogative establish courts to proceed according to the common law, yet that it cannot create any new Court to administer any other law ; and it is laid down by Lord Coke in the 4th Institute that the erection of a new court with a new jurisdiction cannot be without an Act of Parliament.

It cannot be said that any ecclesiastical tribunal or jurisdiction is required in any colony or settlement where there is no established church, and in the case of a settled colony the Ecclesiastical Law of England cannot, for the same reason, be treated as part of the law which the settlers carried with them from the mother country.

So much of the letters patent now in question as attempts to confer any coercive legal jurisdiction is also in violation of the law as declared and established by that part of the Act of the 16 Car. I. c. 11, which remains unrepealed by the 13 Car. II., s. 2, c. 12. It may be useful to state this in detail. By the 16th and 17th sections of the 1 Eliz. c. 1, entitled "An Act for restoring to the Crown the ancient Jurisdiction over the State Ecclesiastical and Spiritual, and abolishing all Foreign Power repugnant to the same," it was enacted that all usurped and foreign power and authority, spiritual and temporal, should for ever be extinguished within the realm, and that such jurisdictions, privileges, superiorities, and pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority had theretofore been or might lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same, and of all manner of heresies, schisms, abuses, offences, contempts, and enormities should for ever be united and annexed to the Imperial Crown of this realm. And by the 18th section the Queen was empowered by letters patent to appoint persons to exercise, occupy, use, and execute all manner of spiritual or ecclesiastical jurisdiction within the realms of England and Ireland, or any other, the dominions and countries of the Crown.

Under this statute the High Commission Court was erected, which was abolished by the 16 Car. I, c. 10.

By the Act of the 16 Car. I, c. 11, the 18th section of the 1 Eliz., c. 1, was wholly repealed, and by the 4th section of the same statute all spiritual and ecclesiastical persons or judges were forbidden under severe penalties to exercise any jurisdiction or coercive legal authority, an enactment which closed all the regular established ecclesiastical tribunals ; but by the 13 Car. II., c. 12, the ordinary ecclesiastical jurisdiction and authority, as it existed before the year 1639, was with certain savings restored to the Archbishops and Bishops ; and the Act of the 16 Car. I., excepting what concerned the High Commission Court or the erection of any such like court by commission, was repealed, but with a proviso that nothing should extend or be construed to revive or give force to the enactments contained in the 18th section of the 1 Eliz. c. 1, which should remain and stand repealed.

There is therefore no power in the Crown to create any new or additional ecclesiastical tribunal or jurisdiction, and the clauses which purport to do so, contained in the letters patent to the appellant and respondent, are simply void in law. No metropolitan or bishop in any colony having legislative institutions, can, by virtue of the Crown's letters patent alone (unless granted under an Act of Parliament, or confirmed by a colonial statute), exercise any coercive jurisdiction, or hold any court or tribunal for that purpose.

Pastoral or spiritual authority may be incidental to the office of bishop, but all jurisdiction in the Church, where it can be lawfully conferred, must proceed from the Crown, and be exercised as the law directs, and suspension or privation of office is matter of coercive legal jurisdiction, and not of mere spiritual authority.

3. If, then, the Bishop of Cape Town had no jurisdiction by law, did he obtain any by contract or submission on the part of the Bishop of Natal?

There is nothing on which such an argument can be attempted to be put, unless it be the oath of canonical obedience, taken by the Bishop of Natal to Dr. Gray as metropolitan.

The argument must be, that both parties being aware that the Bishop of Cape Town had no jurisdiction or legal authority as metropolitan, the appellant agreed to give it to him by voluntary submission.

But even if the parties intended to enter into any such agreement (of which, however, we find no trace), it was not legally competent to the Bishop of Natal to give, or to the Bishop of Cape Town to accept or exercise, any such jurisdiction.

There remains one point to be considered. It was contended before us that if the Bishop of Cape Town had no jurisdiction, his judgment was a nullity, and that no appeal could lie from a nullity to Her Majesty in Council.

But that is by no means the consequence of holding that the respondent had no jurisdiction. The Bishop of Cape Town, acting under the authority which the Queen's letters patent purported to give, asserts that he has held a Court of Justice, and that with certain legal forms he has pronounced a judicial sentence, and that by such sentence he has deposed the Bishop of Natal from his office of bishop, and deprived him of his see. He also asserts that the sentence having been published in the diocese of Natal, the clergy and inhabitants of that diocese are thereby deprived of all episcopal superintendence. Whether these proceedings have the effect which is attributed to them by the Bishop of Cape Town, is a question of the greatest importance, and one which we feel bound to decide. We have already shown that there was no power to confer any jurisdiction on the respondent as metropolitan. The attempt to give appellate jurisdiction to the Archbishop of Canterbury is equally invalid.

This important question can be decided only by the Sovereign as Head of the Established Church, and depositary of the ultimate appellate jurisdiction.

Before the Reformation, in a dispute of this nature between two independent prelates, an appeal would have lain to the Pope; but all appellate authority of the Pope over members of the Established Church is by statute vested in the Crown.

It is the settled prerogative of the Crown to receive appeals in all colonial causes, and by the 25 Hen. VIII., c. 19 (by which the mode of the appeal to the Crown in ecclesiastical causes is directed) it is by the 4th section enacted that "for lack of justice at or in any of the Courts of the Archbishops of this realm, or in any of the King's dominions, it shall be lawful to the parties grieved to appeal to the King's Majesty in the Court of Chancery," an enactment which gave rise to the Commission of Delegates, for which this tribunal is now substituted.

Unless a controversy, such as that which is presented by this appeal and petition, falls to be determined by the ultimate jurisdiction of the Crown, it is plain that there would be a denial of justice, and no remedy for great public inconvenience and mischief. It is right to add, although unnecessary, that by the Act 3 & 4 Wm. IV., c. 41, which constituted this tribunal, Her Majesty has power to refer to the judicial committee for hearing or consideration any such other matters whatsoever as Her Majesty shall think fit, and this committee is thereupon to hear or consider the same, and to advise Her Majesty thereon: and that on June 10, 1864, it was ordered by Her Majesty in Council that the petition and supplemental petition of the appellant should be, and the same were, thereby referred to this committee, to hear the same and report their opinion thereupon to Her Majesty.

Their lordships therefore will humbly report to Her Majesty their judgment and opinion that the proceedings taken by the Bishop of Cape Town, and the judgment or sentence pronounced by him against the Bishop of Natal, are null and void in law.

In the above judgment the Judicial Committee assume that the letters patent are sufficient in law to confer on Dr. Gray the ecclesiastical status of metropolitan, and to create between him and the Bishop of Natal the personal relations of metropolitan and suffragan, as ecclesiastics, but they decide that the letters patent were inoperative to constitute a bishopric, or to confer ecclesiastical jurisdiction; and that it was not competent to the Bishop of Natal to give, or to the Bishop of Cape Town to accept or exercise, any jurisdiction or legal authority as metropolitan.

Their lordships say further that all jurisdiction in the Church, where it can be lawfully conferred, must proceed from the Crown, and suspension or privation of office is a measure of coercive legal jurisdiction, and not of mere spiritual authority. On the other hand, they state that they adhere to the principles laid down in the case of *Long* v. *The Bishop of Cape Town.*

In that case it was decided that under these same letters patent the Bishop of Cape Town was capable of receiving, not from the Crown, but from the consent of Mr. Long, such an authority and

jurisdiction, extending even to the power of deprivation, as would exist between an English bishop and a clergyman holding a living within his diocese, except that the decision of the Bishop of Cape Town, if properly given, would be, not the sentence of a court, to be enforced by its appropriate officers, but it would be the decision of a referee, to which effect would be given by the court established by law.

We will recall to the minds of our readers the facts in *Long* v. *The Bishop of Cape Town*. The case is reported 1 Moo. P. C. C. N. S. 411, 11 W. R. 900.

Mr. Long was a clergyman of the Church of England, holding an incumbency within the limits of the diocese of the Bishop of Cape Town. On his appointment to the incumbency, he took an oath of canonical obedience to his bishop. Subsequently the Bishop of Cape Town considered it expedient, for the well being of the Church in the colony, to convene a synod. He summoned Mr. Long to attend the synod, and to take the necessary steps for holding the election of a delegate for his parish, but Mr. Long and his parishioners being opposed to the measure, Mr. Long did not attend the synod himself, nor did he take any steps to forward the election of a delegate. In consequence of this act of disobedience, the Bishop, after some preliminary proceedings, pronounced a sentence depriving Mr. Long of his charge, and of all emoluments belonging to the same. Recourse was thereupon had to the Supreme Court of the Cape of Good Hope. The proceedings were in the forms of the Roman-Dutch law, and consisted, as we should say, of a bill for an injunction, on the part of Mr. Long, to restrain the Bishop of Cape Town from executing his sentence, and praying that the plaintiff was entitled, of right, to exercise all the lawful functions of incumbent of his church, and of a cross-bill, on the part of the Bishop of Cape Town, praying that Mr. Long might be restrained by injunction, so long as the sentence of deprivation should remain in force, from occupying the incumbency in question, and also praying a declaration that his (the bishop's) ecclesiastical powers under his letters patent might be lawfully exercised by him. The judges of the Supreme Court decided in favour of the bishop. Mr. Long appealed to the Privy Council, and the decision below was reversed, upon the ground that the bishop had no right, as a bishop of the Church of England, to insist upon Mr. Long's attendance at the synod in question, or upon his taking steps to have a delegate appointed in his parish, and that, as a similar refusal on the part of an incumbent in England would not be an offence for which, according to the law of England, he could be suspended or deprived, Mr. Long's conduct did not involve a deprivation of his incumbency. The judicial committee also expressed their opinion that the Anglican Church, in a colony where the Church of England was not established, was in the position of a voluntary society, and that a clergyman there might, if he please, enter into any contract with his bishop as to discipline which he might think fit; that the bishop might pro-

nounce a spiritual sentence against him, but that the enforcement of such sentence rested with the civil courts, who were bound to consider its validity.

The result of this decision was that, as regards an Anglican clergyman in a colonial settlement where the Church of England is not established, the oath of canonical obedience, taken by him to his ordinary, implies that he is bound to render to him all such duty as a clergyman in England is bound to pay to the bishop of his diocese; but that, if he chooses to place himself, by way of contract, under any additional terms by submission to his ordinary, he may lawfully do so; and further, that, in expounding the terms upon which such a clergyman holds any church property, the civil courts in the colony are bound to recognise the position in which he has voluntarily placed himself. Accordingly, if it had been proved, as a matter of fact, that Mr. Long had agreed with the Bishop of Cape Town to attend the synod, which, according to the ecclesiastical law of England, the bishop had no power to convene, he would have been rightly enjoined from continuing in the enjoyment of his benefice so long as he refused to obey his bishop. The difference between an Anglican clergyman in England and in a colonial settlement where the Church is not established, consists in this, that at home a clergyman cannot put himself, by way of contract, in any other relation to his ordinary than that in which the ecclesiastical law of England places him, whereas, in such a colony, he may enter into such terms of submission as he chooses.

In their lordships' judgment in the Colenso case, they do not state why it is that while Mr. Long was competent to confer upon the Bishop of Cape Town this consensual jurisdiction, the Bishop of Natal was incompetent to do so; it is presumed that the distinction lies in the fact that the Bishop of Natal, by accepting his letters patent, possessed a status and rights which, although they were not such as the colony was bound to recognise, yet clothed him with a legal character of which he could not be divested, except by a court in the exercise of a coercive jurisdiction.

However this may be, if the judgments are each to be considered as declarations of existing law, it becomes important to ascertain whether any contract exists at the present time between the Bishops of Natal and Cape Town, under which the latter could give any orders or instructions which the former would be bound to obey, and for disobedience to which he could be cited before the courts either of Cape Town or Natal; and, also, whether any contract exists between the Bishop of Natal and the clergy of Natal belonging to the Episcopalian Church there, whether they may have received their licences from the present bishop or from the Bishop of Cape Town, before the original diocese of Cape Town was divided.

The recent judgment naturally suggests the following questions:—

1. Whether the Bishop of Cape Town possesses any consensual jurisdiction of any kind over the Bishop of Natal, and if so, how far it extends?

2. Does the personal relation of metropolitan and suffragan which appears to exist between the two bishops give to the Bishop of Cape Town within the diocese of Natal any rights, privileges, or authority which it would be proper for the Bishop of Natal to concede?

3. Does the Bishop of Natal possess any consensual jurisdiction over (*a.*) those clergymen who have received their licences from him, (*b.*) those who have not received their licences from him, and if so, how far does it extend?

4. What would be the proper mode of exercising that consensual jurisdiction if the bishops possess it?

This subject will be fully considered in our next number.

THE EDMUNDS CASE.

On March 6, in the House of Commons, Lord Stanley asked the Attorney-General whether the inquiry into certain alleged irregularities in the accounts of the Patent Office, had been completed. To which the Attorney-General replied in the affirmative, and but for certain reasons, he was prepared to lay the report on the table. On the following day the Lord Chancellor in his place in the House of Lords, went into the details of Mr. Edmunds' resignation, and subsequent grant of a pension, by a committee of their Lordships' House, the substance of which will be found in the abstract of the report below. In conclusion, His Lordship called the attention of the House to a matter upon which there may be a difference of opinion. He said, "I sit myself upon these transactions, to judge them with the extremest care and accuracy, and what I think this one open to —possibly open to—is this observation, that it was my duty to have pursued Mr. Edmunds, and to have communicated to the committee the information which, but for the resignation of Mr. Edmunds, it was my intention to have laid before the House in the shape of a paper, and to have had the matter referred to a committee. Now, my Lords, rightly or wrongly, I could not bring my mind to that. I must tell your Lordships that the law officers have been consulted, and that they were of opinion that there was no ground for criminal proceedings; and even if these could have been instituted with success, they would have been unfair and unjust, because the whole of the information attaching to Mr. Edmunds' defalcation, or, at least, the principal part of it, had been obtained from his confession. Well, then, it was now a matter of civil liability. Mr. Edmunds said that he had paid the whole amount; the Treasury said that he was still liable in a large sum of money. If it had turned out, or if it should hereafter turn out, that Mr. Edmunds has paid the whole amount, it would have been wrong to deprive him of his pension; and if it should turn out that Mr. Edmunds is still a debtor, the pension is liable to be taken, and will be taken, in satisfaction of that

debt. My Lords, under these circumstances, I appeal to every one of your Lordships whether, uncalled for, without being required so to do, it was my duty to have followed Mr. Edmunds to that committee, and to have insisted on that committee inquiring into these charges."

With these observations, His Lordship moved for a Select Committee to inquire into all the circumstances connected with the resignation by Mr. Edmunds of the office of Clerk of the Patents and Clerk to the Commissioners of Patents, and Reading Clerk to the House of Lords, and also as to the circumstances connected with the grant of the retiring pension to him. The Lord President (Earl Granville), the Duke of Somerset, the Earl of Derby, the Duke of Montrose, the Earl of Clarendon, the Earl of Malmesbury, the Earl of Donoughmore, the Earl of Dalhousie, Lord Stanley of Alderley, Lord Chelmsford, and Lord Taunton, were appointed on the Committee.

The Committee sat several times before the Easter recess, and having now resumed the enquiry may be shortly expected to make their report. In the mean time a return moved for on the 21st March, by Mr. Hodgkinson "of the Reports made to the Commissioners of Patents, by Mr. Hindmarch, Q.C., and Mr. Greenwood, Q.C., the Commissioners appointed to institute inquiries in reference to the Patent Office accounts, and of any evidence on which such reports were founded, and of any answers that may have been made thereto," has been issued, and contains a full report of the inquiry into the management of the Patent Office by the Commissioners. From that report we glean that the "preliminary report" to the Lord Chancellor and to the Commissioners of Patents, of Messrs. Greenwood and Hindmarch was dated the 12th of July last. These gentlemen, it is stated, had been prepared to recommend Mr. Edmunds' removal from his offices on account of his offensive, harsh, and unnecessarily severe conduct towards his subordinates, and his serious neglect of his duty, when their attention was drawn to more serious matters. Various details are gone into respecting the defalcations and incorrect accounts, the inquiry Commissioners bringing against him, in substance, as the result of their investigations, the following principal charges:—1. That Mr. Edmunds had, from the year 1852, withheld from the public purse large sums of money which he ought to have accounted for and paid quarterly in every year from that to the present. 2. That he had in 1853 advanced £500 out of the public moneys for the purchase of stamps, and had, in 1863 taken £500 (in purported repayment) out of the public moneys and put it into his private pocket. 3. That he had purchased stamps at wholesale prices, sold them in the Patent Office at retail prices, and put the difference into his own pocket instead of crediting the amount to the public, the purchase having been made out of public moneys. 4. That he had drawn large sums out of the public moneys of the office to his own use, and had given no account of such sums. 5. That he had withheld a sum of £399 7*s.* 4*d.* for which he ought

to have given credit to the Treasury, and had three times passed his accounts, while that sum was in his hands, without noticing it.

On September 20th, Mr. Edmunds submitted a lengthened statement to the Lord Chancellor. At the outset he reminds His Lordship that in the early part of 1863, he (Mr. Edmunds) applied for leave to resign his offices of Clerk of the Patents and Clerk of the Commissioners of Patents, requesting at the same time His Lordship's kind assistance in obtaining from the Treasury the allowance to which he was entitled. Upon the perusal of Messrs. Greenwood and Hindmarch's report, "my previously existing desire for retirement," says Mr. Edmunds, "revived with additional force. It was evident to me, for reasons which I will explain more fully presently, that I could not hope to retain, with advantage to the public service, the offices of the Clerk of the Patents and Clerk of the Commissioners of Patents; and an intimation was therefore made to your Lordship that I was prepared to resign those offices. In answer, I was informed, by a written communication from your Lordship, that if I thought proper to surrender the offices, and would undertake forthwith to account for and pay over to the Treasury all sums of money due from me as Clerk of the Patents, the proceedings fixed for the Monday following would not be taken. It was, however, added, "The Lord Chancellor will take the opinion of Lord Cranworth and Lord Kingsdown as to the course which, under all the circumstances of the case, it will be the duty of His Lordship to adopt with reference to the office of Reading Clerk and Clerk of the Private Committees, held by Mr. Edmunds in the House of Lords." On the following day (July 30), the offices of Clerk of the Patents and Clerk of the Commissioners of Patents were surrendered to your Lordship, and an undertaking to account given, and at the same time a hope was expressed that your Lordship would think it right not to take the opinion of Lord Cranworth and Lord Kingsdown, until your Lordship shall be in possession of my answer to the reports of Messrs. Greenwood and Hindmarch. In reply, a communication, dated August 8, was received from your Lordship's secretary, in which, after explaining that the delay in replying had been caused by your Lordship's illness, it was stated that your Lordship had treated the report, 'being the result of inquiries made in Mr. Edmunds' presence, as an admitted document, and transmitted it to Lord Cranworth and Lord Kingsdown;' however, your Lordship added that you would gladly afford me full opportunity of explanation and answer." To some of the charges he owns that he is in default, but he says that he stands cleared from all fraudulent intent; and as to another he says, "while no charge can legally be brought against me, I regret for my own sake that I should have acted as I have done." He adds, that he is ready to pay into Her Majesty's Exchequer the amount which, on an investigation of his books by a professed accountant, appeared to have been received by him and not yet paid over. He urges that his duties in the House of Lords are in no way connected with these proceedings, and that the loss of his office there would bring with it absolute destitution.

The next papers in the Blue Book are the observations, separately made, of Mr. Greenwood and Mr. Hindmarch upon Mr. Edmunds' statement. Mr. Greenwood says that not one of the charges contained in their report is denied by Mr. Edmunds. He states plainly that they have been compelled, by what has taken place, to discredit Mr. Edmunds' word, and Mr. Greenwood adds that the inquiry is at present (October 29) by no means exhausted. Mr. Hindmarch, taking the same ground as Mr. Greenwood, in a report of much greater length, dated November 1, mentions incidentally that they had held eleven sittings, each of several hours' duration, and that they had found great difficulties in obtaining information. He makes various charges against Mr. Edmunds of attempting to divert them from the course of their inquiry, and accuses him of making various assertions opposed to the truth. "The violation of his duties to the Crown and public," says Mr. Hindmarch, "and the gross misconduct of which Mr. Edmunds has been guilty, appears to me to deserve the severest reprobation, if no greater punishment. The statute 24 & 25 Vict., c. 96 (the Larceny Act), by section 70 provides (amongst other things), that whosoever, being employed in the public service of Her Majesty, and entrusted by virtue of such employment with the receipt, custody, management, or control of any money, shall embezzle any money entrusted to, or received or taken into possession by him by virtue of his employment, or any part thereof, or in any manner fraudulently apply or dispose of the same, or any part thereof, to his own use or benefit, or for any purpose whatsoever except for the public service, shall be deemed to have feloniously stolen the same from Her Majesty. Mr. Edmunds will have great reason to congratulate himself if, through the leniency of the Crown, he shall not be deemed to have acted with a fraudulent intent of such a description as to make him chargeable with offences against the provisions of the statute above cited."

On the 17th of December Mr. Edmunds forwarded to the Lord Chancellor a reply to Mr. Greenwood's observations, and this is followed in the return by a second report of Messrs. Greenwood and Hindmarch, dated the 31st of January last, completing their inquiries into the conduct of Mr. Edmunds and Mr. Ruscoe in the Patent Office. This report occupies fifteen pages of the Blue Book. With regard to Mr. Ruscoe's case, we may state that though the commissioners say that "perhaps with such an example before him, it cannot be wondered that Mr. Ruscoe should have followed such a course," yet from his gross misconduct he ought no longer to remain in the office which he holds under the Commissioners of Patents. "We are not in a position to say precisely how much of the money withheld from the Exchequer has been taken by Mr. Edmunds and how much by Mr. Ruscoe. Vastly the larger amount has been taken by Mr. Edmunds."

Upon the whole Messrs. Greenwood and Hindmarch are satisfied, and find that the following sums payable to the Consolidated Fund and Suitors' Fee Fund respectively, and for which Mr. Edmunds

was responsible, were withheld by him at the commencement of their inquiry :—

	£	s.	d.
Balance of money due for fees payable to the Consolidated Fund, exclusive of the amounts of 12*s.* 10*d.* deducted per skin.....	8,764	3	6
Aggregate amount of sums of 12*s.* 10*d.* per skin abstracted from the moneys received in the office for account of the public.....	3,033	16	0
Amount of discounts taken for the private use of Messrs. Edmunds and Roscue, for stamps purchased with public money	5,131	13	6
Deficiency in payments due to Suitors' Fee Fund	560	7	10
	17,490	0	10
Of this Mr. Edmunds has refunded (*videlicet*, in September last) the sum of	7,872	5	6
Leaving a balance, for which he is still liable, of	£9,617	15	4

"These sums have been withheld by him for very many years, and, if they are to be treated as a debt, ought to be augmented by compound interest."

In a supplemental report, Messrs. Greenwood and Hindmarch, upon information conveyed to them by the Accountant-General (whose letter is printed), reduce the amount for which Mr. Edmunds was liable previously to his refunding the sum of £7,872 5*s.* 6*d.* in September last, as stated in their report of January 31, from £17,490 0*s.* 10*d.* to £17,022 4*s.* 4*d.*

The following is a copy of Lord Cranworth's award on the question at issue between Mr. Leonard Edmunds and the Brougham family :

"Whereas by an agreement in writing under the hands of William Brougham and Leonard Edmunds, the said William Brougham having signed the same on behalf of himself and Lord Brougham, it was agreed to refer all questions and disputes between them, the said Lord Brougham, William Brougham, and Leonard Edmunds, to the award of me, Robert Monsey Lord Cranworth, and the parties to the said reference have agreed that the subjects so submitted to me were embraced under three heads :—1. Whether Lord Brougham is liable to the payment of all or any part of a sum of £5,000, secured by a mortgage dated in 1811, or the interest thereof. 2. Whether William Brougham is liable to Leonard Edmunds in respect of a bond for £1,200 dated in 1845 ; and, 3, whether W. Brougham is liable to repay to Leonard Edmunds all or any part of a sum of £9,300, alleged by Leonard Edmunds to have been paid or accounted for by him to W. Brougham as a trustee for the family of John Brougham, deceased, but which William Brougham had not applied on any such trust. Now, having taken on myself the burden of the reference, I decide as follows :—

"1. As to the said mortgage, I decide that Lord Brougham is liable to repay the principal sum of £5,000 thereby secured, with interest thereon, from the 24th of June, 1864, up to which time all parties admit that interest has been paid. I come to this conclusion on the facts as stated by Lord Brougham and W. Brougham. I place entire confidence in what Lord Brougham states, namely, that he

did not receive any part of the £5,000, and had altogether forgotten that any such mortgage existed; but his brother James Brougham joined in the mortgage, and Lord Brougham and James Brougham jointly and severally covenanted with the mortgagee for payment of principal and interest. James Brougham died at the end of 1833; but shortly before his death he came to certain arrangements with Leonard Edmunds, under which it was stipulated that Leonard Edmunds should thenceforth pay the interest on the mortgage (£200 per annum), which James Brougham was, by virtue of his covenant, bound to pay. Leonard Edmunds has accordingly regularly paid this interest, which I consider to be the same thing as if James Brougham, one of the parties liable, had himself paid it. The mortgage, therefore, is clearly a subsisting mortgage valid against Lord Brougham, who, though appearing on the face of the deed to be the principal debtor, was, I have no doubt, merely a surety for his brother James.

"2. With respect to the £1,200 bond there is no dispute. W. Brougham is clearly liable to the payment of the £1,200 thereby secured, with interest from 24th of June, 1864, up to which day it is admitted that all interest has been paid.

"3. As to the £9,300 claimed by Leonard Edmunds, I decide that he has no right to recover any part of it. He says it is the amount of payments of £300 per annum, which, for the last thirty-one years, he has paid to or on account of W. Brougham, as a trustee for the family of John Brougham, but which sums W. Brougham has appropriated to his own use. W. Brougham admits the receipt of £100 per annum, but no more; but he denies that he received it as a trustee for the family of John, or on any other trust, though it was well understood between him and Leonard Edmunds that it should be made available towards the liquidation of the debts of James; and, accordingly, it is established that in the year 1840 W. Brougham effected a policy on the life of Leonard Edmunds for £3,000, and he has ever since applied the £100 per annum (within a small fraction) to keep alive the policy, and so form a fund for payment, or towards payment, of the £5,000 at Leonard Edmunds' death, when his payment of the interest would cease. I do not think it necessary to pursue any investigation as to this part of the matters referred to me, for, even taking the facts to be as represented by Leonard Edmunds, they do not give him a right to recover back from W. Brougham money which he holds as trustee for the family of John. If the facts be as Leonard Edmunds represents them to be, the family of John may have a claim on W. Brougham which this award cannot reach. Dated this 26th day of January, 1865.

"CRANWORTH."

Thus the matter stands at the present moment. We are glad to be able to state, upon the highest and best authority, that the unsullied reputation of Lord Brougham will not suffer in the slightest degree by the present inquiry. The forthcoming report will completely

exculpate His Lordship from the charges and imputations which have been, more or less directly, preferred against him. We may add that, from the beginning, few, if any, gave any credence to those imputations. Our readers must for the present accept our simple statement. Considerations of an imperative nature prevent its being substantiated at this time by positive proof: that proof will be placed on record in the pages of our next Number.

LAW REPORTING.

THE following address, bearing the signature of Sir Fitzroy Kelly, has been extensively circulated among both branches of the profession:—

"At a meeting of the Bar held in Lincoln's Inn Hall on the 2nd December, 1863, convened by the Attorney-General, Sir Roundell Palmer, Knight, M.P., in pursuance of a requisition signed by 380 practising members of the Bar, and presided over by him, it was resolved, 'That the present system of preparing, editing and publishing reports of judicial decisions in this country requires amendment.' At the same meeting a committee was appointed to prepare a plan of amendment, to be submitted to a future meeting of the Bar, for their consideration. The committee consisted of the undermentioned barristers, namely, Sir R. P. Collier, Knt., M.P., Solicitor-General; Sir Robert Phillimore, Knt., Queen's Advocate; Sir Fitzroy Kelly, Knt., Q.C., M.P.; W. T. S. Daniel, Esq., Q.C.; Montague E. Smith, Esq., Q.C., M.P., now one of Her Majesty's Justices of the Common Pleas; C. Jasper Selwyn, Esq., Q.C., M.P.; Sir Hugh M. Cairns, Q.C., M.P.; R. Paul Amphlett, Esq., Q.C.; the Hon. George Denman, Q.C., M.P.; George Mellish, Esq., Q.C.; James Dickinson, Esq.; Joshua Williams, Esq.; George Sweet, Esq.; Alexander Pulling, Esq., now Mr. Serjeant Pulling; George Druce, Esq.; G. W. Hastings, Esq.; Henry Matthews, Esq.; Nath. Lindley, Esq.; J. R. Quain, Esq.; Alfred Wills, Esq.; John Westlake, Esq.; F. Vaughan Hawkins, Esq.

"The committee made their report on the 14th June, 1864, recommending a scheme containing a plan of amendment. The report was signed by the undermentioned members of the committee:— R. Paul Amphlett, Esq., Q.C., Chairman of the Committee; Sir Robert Phillimore, Knt., Queen's Advocate; Sir Fitzroy Kelly, Knt., Q.C., M.P.; W. T. S. Daniel, Esq., Q.C.; C. Jasper Selwyn, Esq., Q.C., M.P.; Sir Hugh M. Cairns, Knt., Q.C., M.P.; Mr. Serjeant Pulling; James Dickinson, Esq.; George Druce, Esq.; G. W. Hastings, Esq.; N. Lindley, Esq.; J. R. Quain, Esq.; Alfred Wills, Esq.; John Westlake, Esq.; F. Vaughan Hawkins, Esq.

"A meeting of the Bar was held in Lincoln's Inn Hall, under the presidency of Sir Roundell Palmer, as Attorney-General, on the

1st of July, 1864, to receive and consider the report. This meeting, after some discussion, was adjourned until November, in order that in the meantime the report and scheme might be fully considered by the Bar.

"By the scheme it was proposed that a set of Reports in the Superior Courts of Law and Equity, and the Appellate Courts, should be prepared and published under the management of a council, to be appointed as follows:—2 by Lincoln's Inn; 2 by the Inner Temple; 2 by the Middle Temple; 1 by Gray's Inn; 1 by Serjeants' Inn; 2 by the Incorporated Law Society, and, in a certain event which may not arise, 2 by the Lord Chancellor.

"The scheme also proposed that the Attorney-General, the Solicitor-General, and the Queen's Advocate for the time being should be ex-officio members of the council.

"On the 28th of November, 1864, a further meeting of the Bar was held, under the presidency of Sir Roundell Palmer, as Attorney-General, when the report, having been considered, was adopted.

"In Hilary Term, 1865, the report and scheme were submitted to the several Inns of Court, Serjeants' Inn, and the Incorporated Law Society for their consideration; and the Benchers of Lincoln's Inn, the Inner Temple and Middle Temple, and the Incorporated Law Society, have recently appointed members of the council, in conformity with the scheme.

"Gray's Inn has declined, and Serjeant's Inn has not at present decided to appoint members of the council.

"The ex-officio members are—The Attorney-General, Sir Roundell Palmer, Knt., M.P.; the Solicitor-General, Sir Robert P. Collier, Knt., M.P.; the Queen's Advocate, Sir Robert Phillimore, Knt.

"The elected members are—*Lincoln's Inn:* Sir Fitzroy Kelly, Knt., M.P., Q.C.; W. T. S. Daniel, Esq., Q.C. *Inner Temple:* William Forsyth, Esq., Q.C.; George Markham Giffard, Esq., Q.C. *Middle Temple:* T. W. Greene, Esq., Q.C.; J. B. Karslake, Esq., Q.C. *Incorporated Law Society:* W. S. Cookson, Esq. (Firm—Clayton, Cookson & Wainewright), 6 New Square, Lincoln's Inn; William Williams, Esq., Vice-President of the Incorporated Law Society (Firm—Currie & Williams), Lincoln's Inn Fields.

"It is now proposed to invite the assistance and co-operation of the several branches of the profession, for the purpose of accomplishing the object involved in the resolutions of the Bar.

"There are published at the present time six independent sets of reports: 1. *The Regular Reports;* 2. *The Law Journal;* 3. *The Jurist;* 4. *The Law Times;* 5. *The Weekly Reporter;* 6. *The New Reports.* The present cost of all these reports is about £50 per annum; the cost of the regular reports alone is about £30 per annum. The multiplicity of the reports, apart from the cost, occasions the evils of which the profession complain. The remedy proposed is—the establishment, under the management and control of the profession, of one set of Standard Reports, upon the basis of a fair regard for existing interests. One complete set of reports,

prepared with the requisite learning, skill, and care, and published with expedition, regularity, and at moderate cost, is all that is required for citation as authority.

"It needs, surely, no argument to prove how deeply the interests of the public are concerned in the certainty of the law; or how important it is, that the judge who decides, the counsel who advises, and the solicitor under whose guidance the client acts, should all be regulated by one and the same standard of authority. If the legal profession in its several branches co-operate for the purpose, such a set of reports may be obtained, and their continuance secured under public professional control.

"The proposed reports would be divided into three series:—1. Appellate comprising the House of Lords and Privy Council; 2. Chancery—including Bankruptcy Appeals and Lunacy; 3. Common Law—including the Probate, Matrimonial, Admiralty, and Ecclesiastical Courts.

"The common law and equity reports respectively would be published in monthly parts, and the appellate reports as often as should be found convenient, but so that the decisions of the year in all the courts may, as far as practicable, be published within the year. The reports would be prepared by reporters under the supervision of editors to be appointed by the council, and approved by the chief or presiding judge of each court. The proceeds of the reports, after payment of the expenses of printing, sale, distribution and management, would be applied towards the liberal remuneration of the editors and reporters; the principle of the proposed application of the proceeds of the reports being this, that, as the monies are raised from the profession for public professional requirements, their application shall be confined to public professional objects.

"The proposed subscription, payable in advance, is as follows:—for the Entire Series, £5 5*s.* 0*d.*; for the Appellate Series, £2 2*s.* 0*d.*; for the Chancery Series, £3 3*s.* 0*d.*; for the Common Law Series, £3 3*s.* 0*d.*

"The price will be one-third more to non-subscribers.

"Arrangements have been made for the reception of the names of those who may be willing to become subscribers to a set of reports to be established with the above objects; but in order that this may be done, it is requisite that 2,000 subscribers for the entire series, or a subscription of £10,500 per annum at the least, should be obtained.

"The question of the establishment of the proposed set of standard reports is one entirely for the profession to determine, and to their determination it is now submitted.

"Forms of subscription will be circulated, and it is hoped that future proceedings may be decided upon not later than the last day of Trinity Term, the 15th of June next.

"In the event of subscriptions to a sufficient amount being received, endeavours will be made to arrange that the reports commence as from the first day of Michaelmas Term next.

"Names of subscribers will be received and recorded by James Thomas Hopwood, of No. 3 New Square, Lincoln's Inn, Esq., Secretary *pro tem.*

"FITZROY KELLY."

"Benchers' Reading Room, Lincoln's Inn,
"11*th March*, 1865."

INNER TEMPLE CHAMBERS.

WITHIN a few days we have reasons to suppose the following petition relating to the letting of Chambers in the Temple will be presented to the Benchers of the Inner Temple :—

"To the Honourable the Benchers of the Inner Temple.

"The humble petition of Thomas de Meschin, LL.D., of the Inner Temple, Barrister-at-Law.

"Most Respectfully Showeth,

"1. That the Patent of 6th Jas. I., strictly commands that this Inn, and the chambers thereof, shall serve for the 'hospitatione et educatione' of the students and professors of the laws residing in the same for ever. (Inns Ct. Com. Rep., 208., Dugd. Or Jur., 146.)

"2. That by an indenture of partition dated November 2, 1732, the said premises were conveyed to the Benchers, 'in trust to serve and be employed for the entertaining, education, and habitation of the students and professors of the law, residing within the Inner Temple.' (Inns Ct. Com. Rep., 215.)

"3. That in derogation of the said trusts, contrary to immemorial custom, and to the great detriment of the students and professors of this Inn, many chambers are now let to, and occupied by, utter strangers, who are neither students nor professors of this Inn; one of such strangers, it is said, monopolising no less than four separate sets of the best chambers. (Dugd. Or Jur., 140-187.)

"4. That many members who rent chambers, have sub-let the whole, or a part of such chambers, to persons who are not students or professors of this Inn, in violation of the said trusts, of the orders of Parliament, and of the ancient usage of this Inn. (Dugd. Or Jur., 147., Reg. In. Temple, Vol. I., 173 a.)

"5. That the present high and excessive rent of chambers, has been caused by this unauthorised intrusion of strangers, and is in the highest degree prejudicial to the best interests of the profession.

"(*a.*) It entirely prevents the residence and social intercourse of students, provided for by the patent 6 Jas. I., and recommended by the Inns of Court Commission. (Rep. 9, 208.)

"(*b.*) It most injuriously exhausts the capital of barristers, compelling them to seek early practice, whether competent or not, contrary to ancient usage which required a barrister to be called five years before he was allowed to plead, and regarded him as a mere learner until of sixteen years standing. (3 Bl. Com., 27. 5 Reeves' Hist., 248. Dugd. Or Jur., 310-316.)

"(*c.*) It tends to make barristers with small means endeavour to aug-

ment their incomes by engaging in incongruous pursuits, thereby diverting their attention from the study of the laws, or constrains them prematurely to abandon the bar if they fail to secure early practice.

"(*d.*) It thus tends to induce a decay of sound legal learning; under the former system of moots before a man was permitted to appear in court he must have been an accomplished speaker and a thoroughly trained lawyer of known learning and ability. (Dugd. Or Jur., 148. 4 Reeves' Hist., 433-434.)

"(*e.*) It thus also tends to monopolise the profession in the hands of those who commence their career with a connection capable of pushing them into early practice.

"(*f.*) It tends to prevent that salutary and ancient custom of residence in chambers (Pat. Jac. I. Dugd. Or Jur., *passim*), which the construction of the Thames embankment may perhaps revive.

"(*g.*) It crowds several barristers into the same set of chambers.

"6. That the students and professors of this Inn derive no advantage from its rent-roll being large, for the Middle Temple with a rent-roll of £5,628 bestows equal, and in one matter of 'entertainment' (dinners),* greater benefits on its members, than this Inn with its rent-roll of £16,493. (Inns Ct. Com. Rep. 6, 48.)

"7. That considering the ten Inns of Chancery (including three belonging to this Inn) which formerly educated at least 100 students each, have, through the *laches* of their members, and to the great detriment of the public, now been suffered to become private property —it is natural that the least divertion of the corpus of the trust estate of this Inn, from the trusts above referred to should arouse feelings of profound alarm. (Fortesc. de land., c. 49.—4 Reeve's Hist., 120. 3 Coke's Rep. pref. 1 Bl. Com., 25.)

"8. That inasmuch as the Court of Chancery will interfere and order leases to be cancelled which have been made in derogation of the trusts of a charity (2 Russ., 306), your petitioner very humbly prays that all leases, under leases, and other lettings made in violation of the said trusts may be forthwith cancelled, unless made to members of other Inns of Court, who desire to become members of this Inn; and that strangers be not permitted on any pretence to occupy any chambers or rooms, or to have their names inscribed on any doors, within the limits of this Inn. But that this Inn be henceforth reserved for the exclusive use and enjoyment of the members thereof, in accordance with immemorial custom and the aforesaid trusts.

"Your petitioner has the honour to be,

"Your most obedient humble servant,

"Easter Term, 1865." "THOMAS DE MESCHIN.

* If a barrister dine one day at the Inner Temple he pays, including gowns, &c., 15*s.*, or for half a week. If he dine four days, 22*s.*, or for one week. If he dine four days in one week and one day in another week, 32*s.* If he dine four days in both weeks he pays 39*s.*, and so on to the end of this most complex tariff. At the Middle Temple, where fully as good if not a better dinner it is said is given, with a choice of five different sorts of wine (in the Inner it is restricted to port and sherry), the charge is 2*s.* a-day, no matter how often or seldom one dines. It seems worthy of consideration if the present system of messes should not be abolished, and the more convenient and agreeable practice that obtains at the Law Institution in Chancery-lane be adopted, where a member can dine when and how he pleases.

APPOINTMENTS.

The Queen has appointed Lord Chelmsford; Lord Naas; Lord Lyveden; the Right Hon. Spencer H. Walpole, M.P.; the Right Hon. William Monsell, M.P.; the Lord Justice Clerk; Mr. Justice O'Hagan; the Judge of the Court of Probate; Vice-Chancellor Sir W. Page Wood; the Attorney-General; the Solicitor-General for Scotland; the Admiralty Advocate, and Alexander M. Dunlop, Esq., M.P., to be Commissioners for Inquiry into the Marriage Laws.

Mr. Montague Smith, Q.C., has been appointed a Justice of the Common Pleas, in the place of the Hon. Mr. Justice Williams, resigned.

Mr. James Fleming, Q.C., has been appointed Chief Commissioner, and Mr. R. J. Cust Assistant Commissioner of the West India Incumbered Estates Court, in the room of Mr. Stonor and Sir Frederic Rogers, Bart., resigned.

Mr. H. J. Stonor, Chief Commissioner of the West India Incumbered Estates Court, has been appointed Judge of the Surrey and Berks County Courts (circuit 45).

Mr. B. C. Robinson has been raised to the degree of Serjeant-at-Law.

Mr. Joshua Williams; Mr. Peter De Gex; Mr. E. F. Smith; Mr. George Jessel; Mr. Thomas Webster, F.R.S.; Sir Thomas Phillips; Mr. Joseph Brown; Mr. Clement Millward; Mr. J. R. Bulwer, and Mr. H. S. Gifford, have been appointed Queen's Counsel.

Mr. John Cutler, of Lincoln's Inn, has been appointed Professor of English Law and Jurisprudence at King's College.

Mr. C. Manby Smith, Barrister-at-Law, has been appointed Master of the Court of Queen's Bench, in place of Sir A. D. Croft, Bart., deceased.

Mr. T. E. Chitty, Clerk of Arraigns for the Western Circuit, has been appointed Clerk of Assize and Clerk of the Crown for the County and City of Bristol.

Mr. Henry Sewell Stokes, has been appointed Clerk of the Peace for the County of Cornwall, in the place of the late Mr. Edward Coode.

The Hon. Slingsby Bethell, Barrister-at-Law, has been appointed Reading Clerk and Clerk of Committees of the House of Lords.

IRELAND.—The Right Hon. Thomas O'Hagan, M.P., Attorney-General, has been appointed a Justice of the Common Pleas, in the room of the late Mr. Justice Ball.

Mr. J. A. Lawson, Solicitor-General, has been appointed Attorney-General; Mr. Serjeant Sullivan has been appointed Solicitor-General; Mr. Charles R. Barry, Q.C., has been appointed Law Adviser.

Sir Colman O'Loghlen, Bart., Q.C., M.P., has been raised to the degree of Serjeant-at-Law.

The following gentlemen have been appointed Chairmen of Quarter Sessions :—Mr. James Gibson, for the county Donegal, in the room of the late Mr. Robert Andrews, Q.C. ; Mr. Charles Kelly, Q.C., for the county of Longford ; Mr. Rolleston, Q.C., for the county of Tipperary, in the place of Mr. Serjeant Howley, resigned ; and Mr. Joshua Clarke, Q.C., for the Queen's County.

Mr. J. F. Townsend, LL.D. ; Mr. T. A. Purcell ; Mr. G. A. C. May ; Mr. John O'Hagan, and Mr. Christopher Palles, LL.D., have been appointed Queen's Counsel.

Mr. Alexander Ball has been appointed a Stipendiary Magistrate, in the room of the late Mr. Singleton.

Mr. A. J. Curran has been appointed Senior Crown Prosecutor for the counties of Meath and Carlow, vacant by the resignation of Mr. Loftus H. Bland, Q.C. ; Mr. James Murphy, Crown Prosecutor at the Recorder's Court ; Mr. George Waters, for county Kerry ; Mr. James Green, for county of Cork ; and Mr. Phillip Keogh, for the city of Cork.

India.—Mr. J. Pitt Kennedy has been appointed Recorder of Rangoon ; Mr. L. Charles Innes has been appointed Judge of the High Courts of Judicature at Madras.

Newfoundland.—Mr. Hugh W. Hoyles has been appointed Chief-Justice of the Supreme Court, in the room of Sir F. Brady, resigned.

BAR EXAMINATIONS.

Inns of Court Examinations.—At a meeting of the Board of Examiners, appointed by the four Inns of Court, to conduct under Clause 2 of the Consolidated Regulations, dated Michaelmas Term, 1853, the examination of persons applying to be admitted as students to any Inn of Court, held in the Parliament Chambers, Middle Temple, on January 25, 1865, it was among other things resolved :—That during the current year an examination should be held in the Benchers' Room, Middle Temple Library, on every Saturday during Term, and the Saturday preceding each Term, from 10 A.M. till 1 P.M. That whenever the Chairman should think fit he might fix one or more extra examinations, and appoint examiners to conduct the same, and notice of the time of every such examination should be sent to the four Inns of Court. That two examiners should conduct such examination, of whom one should always be present, and both should be present at any *vivâ voce* examination, and they should enter their names and the date of the examination in a book to be kept for the purpose. That the certificates should be granted and signed by the two examiners who conducted the examination ; and any other examiners who might have been present should not decide

on the merits of the candidates, and should not be considered as "attending," within the meaning of Rule 9 of the "Consolidated Regulations." That there should be an examination on paper in all cases, and a *vivâ voce* examination at the discretion of the examiners; and that the examination in the Latin language should consist of translations by the candidates from one or more classic authors. In pursuance of the above regulations, examination of candidates will be held in the Benchers' Room, Middle Temple Library, on the following days, from 10 A.M. till 1 P.M.: May 6, 20, 27; June 3, 10; October 28; November 4, 11, 18, 25, 1865; and January 6, 1866.

EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

Hilary Term, 1865.

At the final examination of candidates for admission on the roll of attorneys and solicitors of the superior courts, the examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—John Nalder, aged 21; W. H. Hodson, aged 21; J. R. Lane, aged 24; W. P. Keary, aged 22; W. W. Kirkman, aged 22.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books:—To Mr. Nalder, a Prize of the Honourable Society of Clifford's Inn; To Mr. Hodson, a Prize of the Honourable Society of Clement's Inn; To Mr. Lane, Mr. Keary, and Mr. Kirkman, each one of the prizes of the Incorporated Law Society.

The following candidates, under the age of 26, passed examinations which entitle them to commendation:—Charles Bell, aged 21; Arthur Bird, aged 21; W. R. Brooks, aged 23; J. W. Clabburn, aged 21; T. H. Lambert, aged 21; R. B. Pugh, aged 23; G. W. Thomas, aged 21; Robert Trimmer, aged 21; William Wood, jun., aged 22. The Council have accordingly awarded them certificates of merit.

The examiners have further announced to the following candidates, whose names are placed in alphabetical order, that their answers to the questions at the examinations were highly satisfactory, and would have entitled them to certificates of merit if they had been under the age of 26:—A. G. Ditton; H. S. Warwick; William Groves, B.A.

The number of candidates examined in this term was 139; of these 122 passed, and 17 were postponed.

The examiners reported that the following gentlemen have passed the intermediate examination with distinction:—F. H. Kendall, aged 19; T. J. Webb, aged 19.

The number of candidates examined in this term was 77; of these 65 were passed, and 12 postponed.

Necrology.

January.

5th. Story, Henry, Esq., Solicitor, aged 43.
16th. Dickens, T. H, Esq., Senior Magistrate of Calcutta.
25th. Woolcot, James, Esq., Solicitor, aged 39.
25th. Miles, Henry, Esq., Barrister-at-Law.
28th. Walker, Holden, Esq., Solicitor, aged 68.
29th. Goodeve, Joseph, Esq., late Master in Equity, Calcutta, and Professor of English Law at Presidency College, aged 63.
29th. Gregory Jones, Esq., Solicitor, aged 88.
30th. Midwood, C. W., Esq., Solicitor, aged 48.
31st. Scott, George, Esq., C.B., late Chief-Justice of Trinadad, aged 82.

February.

9th. Lowndes, M. Dobson, Esq., Solicitor, aged 69.
12th. Irvine, John, Esq., Solicitor.
12th. Smith, A. H., Esq., Solicitor.
13th. Coode, Edward, Esq., Clerk of the Peace for Cornwall, aged 72.
17th. Horn, H. G., Esq., late Clerk of Arraigns of the Western Circuit, aged 63.
19th. Hartley, G., Esq., Solicitor, aged 60.
20th. Andrews, Robert, Esq., Q.C., LL.D.
22nd. Hodson, T. Esq., Solicitor, aged 68.
24th. Lovell, C. W., Esq., Solicitor, aged 78.
26th. Orme, C., Esq., Solicitor, aged 54.
28th. Maxon, F. T., Esq., Solicitor, aged 75.

March.

12th. BRAMLEY, EDWARD, Esq., Town Clerk of Sheffield.
14th. CHESTER. E. Esq., Solicitor.
15th. HALLAM, E. J., Esq., Solicitor, aged 80.
20th. WATERWORTH, THOMAS, Esq., Solicitor, aged 53.
25th. MARTIN, JOHN, Esq., Barrister-at-Law, aged 34.
26th. MCCORMACK, JOHN, Esq., Chief Police Magistrate of Sierra Leone, aged 72.
27th. WHARTON, G. B., Esq., Clerk of the Peace for Durham, aged 93.
28th. O'BRIEN, MICHAEL, Esq., First Clerk of the Crown and Hanaper Office, Dublin.

April.

6th. LOWNDES, W. L., Esq., Q.C., aged 72.
7th. OWSTON, R., Esq., Solicitor, aged 63.
8th. CARR, C., Esq., Solicitor, aged 73.

List of New Publications.

Baillie.—A Digest of Moohummudan Law on the Subjects to which it is usually applied by British Courts of Justice in India. Compiled and Translated from Authorities in the original Arabic; with an Introduction and Explanatory Notes. By N. B. E. Baillie. 8vo. 28*s.* cloth.

Baker.—The Laws relating to Public Health, Sanitary, Medical, Protective, including the Legislation to the end of the last Session of Parliament connected with Adulteration of Food, Alkali Works, Apothecaries, Arsenic, &c.; also Rules, Forms, and Practical Instructions. By T. Baker, Esq., Barrister-at-Law. 8vo. 18*s.* cloth.

Barry.—A Treatise on the Practice of Conveyancing. By William Whittaker Barry, of Lincoln's Inn, Esq., Barrister-at-Law, late holder of the Studentship of the Inns of Court, and author of a "Treatise on the Statutory Jurisdiction of the Court of Chancery." 8vo. cloth.

Bateman.—The General Highway Acts. By J. Bateman, Esq., Barrister-at-Law. Second Edition, with Supplement. 12mo. 10*s.* 6*d.* cloth.

Cust.—A Treatise on the West Indian Encumbered Estates Acts; with Appendix. By R. J. Cust, Esq., Barrister-at-Law. Second Edition. 12mo. 7*s.* 6*d.* cloth.

Dodd and Brooks.—The Law and Practice of the Court of Probate, Contentious, and Common Form; with Rules, Statutes, and Forms. By P. W. Dodd and G. H. Brooks. 8vo. 31*s.* 6*d.* cloth.

Grant's—Law of Banking; Banker and Customer; Banker and Correspondent; Private Banks; Banking Co-partnerships and Joint-Stock Banks, Colonial Banks, Savings Banks; comprising the Rights and Liabilities, and the Remedies of and against Directors, Managers, Clerks, Shareholders, &c.; the Rules as to Cheques, Orders, Bills payable at Bankers, Accountable Receipts, Bank Notes, Deposits of Securities, Guarantees, &c. Second Edition. By R. A. Fisher, Esq., of the Middle Temple, Barrister-at-Law. 8vo. 21*s.* cloth.

Greenwood and Horwood.—A Manual of the Practice of Conveyancing, showing the present practice relating to the Daily Routine of Conveyancing in Solicitors' Offices, to which are added Concise Common Forms and Precedents. By G. W. Greenwood and Henry Horwood. Third Edition, revised and enlarged. 8vo. 15*s.* cloth.

Haynes.—Outlines of Equity; being a Series of Elementary Lectures on Equity Jurisdiction, with Supplementary Lectures on certain Doctrines of Equity. By F. O. Haynes, Esq. Second Edition. Post 8vo. 12*s.* cloth.

Hodges.—A Treatise on the Law of Railways. Fourth Edition. By C. M. Smith, Esq., Barrister-at-Law. Royal 8vo. 35*s.* cloth.

Hunter.—An Elementary View of the Proceedings in a Suit in Equity, with an Appendix of Forms. By S. J. Hunter, Esq., Barrister. Third Edition. By G. W. Lawrance, Esq., Barrister-at-Law. Post 8vo. 9*s.* cloth.

Lees.—The Laws of British Shipping and of Marine Insurance. By. J. Lees. Ninth Edition, revised and enlarged. Post 8vo. 12*s.* 6*d.* cloth.

Lewis.—The Election Manual for England and Wales. By. C. E. Lewis. Third Edition. 12mo. 5*s.* boards.

Lewis.—Principles of Equity Drafting, with Illustrations. By Hubert Lewis, B.A., of the Middle Temple, Barrister-at-law. Author of "Principles of Conveyancing, &c." Post 8vo. cloth.

Mackenzie.—Studies in Roman Law. By Lord Mackenzie. Second Edition. 8vo. 12*s.* cloth.

Macræ-Moir.—Capital Punishment. (Based on Professor Mittermaier's "Toddesstrafe.") Edited by J. Macræ-Moir, Esq., Barrister-at-Law. Post 8vo. 6*s.* cloth.

Marshall's—Treatise on the Law of Marine Insurance, Bottomry, and Respondentia. Fifth Edition. By Sir William Shee, Knight. Royal 8vo. 28*s.* cloth.

Morgan and Davey.—Treatise on Costs in Chancery. By G. O. Morgan and H. Davey, Esqrs., Barristers-at-Law. With an Appendix containing Forms and Precedents of Bills of Costs. 8vo. 21*s.* cloth.

Prideaux.—A Practical Guide to the Duties of Churchwardens in the Execution of their Office; with Lists of Cases, Statutes, Canons, &c. By C. G. Prideaux, Esq., Barrister-at-Law. Tenth Edition. 12mo. 8*s.* cloth.

Shelford.—Law of Highways in England and Wales. By L. Shelford, Esq., Barrister-at-Law. Third Edition, with Supplement to 1865. Post 8vo. 15*s.* cloth.

Tilsley.—A Digest of the Stamp Acts. Ninth Edition, Revised and Corrected. By E. H. Tilsley. 8vo. 12*s.* 6*d.* cloth.

Wharton.—Legal Maxims, with Observations and Cases. By G. F. Wharton. Post 8vo. 10*s.* 6*d.* cloth.

Wordsworth.—The Practice at Elections: being Plain Instructions for the Guidance of Sheriffs and other Returning Officers. By C. Wordsworth, Esq., Barrister-at-Law. Fifth Edition. 12mo. 3*s.* 6*d.* cloth.

Wordsworth.—The Law of Joint Stock Companies, as Altered by the Act of 1862. Including Banking, Insurance, Mining, and General Companies; with the whole Law of Winding-up; with an Appendix of Statutes, General Rules and Forms in Chancery, &c. By C. Wordsworth, Esq., Q.C. Tenth Edition. 8vo. 25*s.* cloth.

THE

Law Magazine and Law Review:

OR,

QUARTERLY JOURNAL OF JURISPRUDENCE.

No. XXXVIII.

Art I.—THE VENUE FOR TRIALS, CIVIL AND CRIMINAL.

To secure a full, fair, and impartial trial of such issues as for the adjustment of personal disputes, or for the protection of public rights it may become necessary to decide, is surely an object to which, in the interests of the public, none can be pronounced as superior.

That, for a jury, men should always be had in whom this great public trust may be reposed with confidence, there should be upon the face of the panel a body of men such as, by character and station, would be above imputation.

To know whether each locality in which trials may be had would afford a sufficient number of qualified persons, becomes a necessary element in the consideration of the question as to the qualification of jurors; and to that question, therefore, the complement is the consideration of the fittest locality in which trials should take place.

The general considerations involved in this question resolve themselves, we think, into the following:—Whether the jurors to whom these issues are submitted should approach their

consideration with minds on which no impression whatsoever, whether as to the persons or the circumstances, has been made; and that, to secure this object, in all cases the trial should be had away from the influence of local feeling?—or whether, for purposes of convenience, or to obviate inconveniences incident to holding investigations at a distance from the locality where the circumstances occurred, the trial should be had in the locality where the facts to be investigated arose?

The ancient practice of the law required that the jury should consist of persons who were witnesses of the facts, or at least in some measure personally cognizant of them, and who consequently in their verdicts gave, not as now the conclusion of their judgment upon facts proved before them in the cause, but their testimony as to facts which they had antecedently known. Accordingly the jury were summoned from the immediate neighbourhood where the facts occurred, from among those persons who best knew the truth of the matter. The separation of the functions of the jury and the witnesses came very slowly into effect. So late as Charles II.'s time the right of a juryman to communicate privately to his fellow-jurymen evidence which had not been produced in court was judicially recognised. But the modern doctrine is, that if a juryman have a knowledge of any matter of evidence in a cause which he is trying, he ought not to impart the same privily to the rest of the jury, but should state to the court that he has such knowledge and thereupon be examined and subject to be cross-examined as a witness. Now although this ancient practice of summoning the jury from the neighbourhood where the cause of action arose had its foundation in the trial by witnesses rather than by judges, yet the convenience of local trials is dwelt upon by Sir Matthew Hale in his "History of the Common Law," remarking that to obviate the troublesome and most expensive attendance of jurors and witnesses, the trial is brought home to them in the county where most of them inhabit.

Thus, then, we are easily led, from the ancient practice

and the principles which guided it, to the consideration of the more modern division of actions into local and transitory, and the system of fixing, accordingly, the venue, or place from whence a jury is to come for the trial of the cause.

In local actions, that is such as could only have arisen in a particular place or county, as in ejectment or in actions for injuries to real property, the case must have been tried in the proper county where the property is situated; but when the action is brought for an injury to the person or personal property, and in general, when it is founded on a contract, express or implied, it is said to be transitory; at the option of the party injured (the plaintiff) the venue might be laid in any county, subject however to the power of the court to change it to the county where the cause of action arose.

Some exceptions were made, as for instance, in favour of magistrates, public officers, and the like, who could not be proceeded against for acts done in discharge of their duty, save in the locality where the acts complained of took place; but with the exception of these, and of that raised by the favour in all matters pertaining to land which pervades our legal system, it was in the power of the party injured to select the place where the trial was to be had. But in fact it would seem that the practice grew out of the statement implied in the venue that the cause of action had arisen in that place, it being changed, on the common affidavit, to the place where, in fact, the action did arise; for, as is said in Reeves' "History of the English Law" (III. 107, &c.), "There was great doubt how far the jurors might take cognizance of matters that happened out of the county."

But in criminal cases, and even (in general) in actions under penal statutes, the common law made the venue the county in which the offence had been committed; the exceptions were mainly the creatures of statute, and these in general left to the prosecutor the choice between the county where the offence had been committed and that in which the prisoner had been apprehended. In some classes of offences, the next

adjoining county might be selected; but without entering into tedious particulars, the rule may be taken as already stated.

Yet, if justice so demanded, this rule yielded to the necessity, and it lay in the power of the Court of Queen's Bench to say if that occasion had arisen. The elements for the consideration of the court may be gathered from the remarks of the late Mr. Justice Perrin, made on a recent and very remarkable occasion. In the case of *The Queen* v. *The Rev. Peter Conway*, prosecuted by order of the House of Commons, the Court of Queen's Bench in Ireland was applied to, that the Attorney-General may be at liberty to enter a suggestion upon the record that a fair and impartial trial could not be had by a jury of the county of Mayo, and that it was convenient that the issue be tried by a jury of the county of Dublin, or such other county as to the court should seem fit. In his judgment the eminent judge already named, cited Wilmot J. (*R.* v. *Harris*, 3 Burr. 1334) to the following effect:—

"There is no rule better established than that all causes (*i.e.* criminal cases) shall be tried in the county and by the neighbourhood of the place where the fact is committed."

And—

"I have (said Mr. Justice Perrin) for more than two-thirds of a century learned, and been successively confirmed by that time in the conviction that trial by a jury of the vicinage is of the essence of the protection of the rights and liberties of the people of the kingdom." (9 Ir. C. L. Rep., 520-1.)

But in the same case Mr. Justice Crampton called attention to what he designated—

"Another common law right, equally open to defendants and prosecutors, namely, that where it appears that either party cannot obtain a fair and impartial trial in the proper county, then the court has jurisdiction to take the case out of that county and to bring it into an indifferent county." (525.)

The statute (19 & 20 Vict., c. 16) under which the trial of Palmer was had, not in Staffordshire but in the Central Criminal Court, became necessary because of the peculiar

jurisdiction of that court, extending as it does over the City of London and county of Middlesex, as well as over portions of the counties of Essex, Kent, and Surrey. In that instance it was the desire of the prisoner that the trial should not be had in his own neighbourhood, where the imputation of the serious offences with which he was charged had so prejudiced him, that he believed a fair and impartial trial could not be had. When the Bill came down to the House of Commons, the Chancellor of the Exchequer stated that the prisoner (Palmer) was an acquiescent party to the arrangement. He had, in fact, previously applied to the Court of Queen's Bench to remove the indictment into that Court, on the ground that a fair and impartial trial could not be had in Staffordshire or elsewhere in the midland counties (*Q.* v. *Palmer*, 5. Ell. and Bl., 1024). But as the Act was to have a general application, and had been rendered necessary by reason that the Queen's Bench, though competent to grant a trial at bar, that is before the judges of the court, or to move the venue to an adjoining county, was unable to remove the indictment into the Central Criminal Court, the terms on which that removal should take place were much discussed. Sir John Pakington suggested that it should be a condition that the consent of the accused should be obtained; this was also urged by Mr. Whiteside, and in following up the same view, Mr. Henley dwelt upon the injustice of the compulsory removal of the prisoner from the place where he is known, and where he also knows those by whom he would be tried, thus destroying all opportunity of challenging the jury. On the other hand, the then Attorney-General for England (now the Lord Chief Justice, Sir Alexander Cockburn), objected that from a traverser who had influence in a locality (as was alleged in the Mayo election case already mentioned), that consent would never be obtained.*

* In the recent discussion (May 9) in the House of Lords on the *Juries (Ireland) Bill*, the Earl of Donoughmore and other Lords seemed unaware o the powers of the Court of the Queen's Bench in Ireland so to deal with the place of trial in criminal cases as to prevent a failure of justice by reason o local prejudice.

Sufficient has now been said to mark with reasonable clearness the strong and steady current wherein our system carried all issues of fact to the place in which the facts had occurred. In criminal trials it holds on still, varying only to meet, in the interests of justice or for greater convenience, certain cases for very special reasons. In all things pertaining to the realty the rule was all but inflexible; nay, there was an old rule of the Court of Common Pleas (Trin. T. 22 Car. 2), "that all actions upon the case, trespass for goods, assault, or imprisonment, arising in any county, be laid in the proper counties, unless they arise where judges of *nisi prius* do seldom come;" but this became obsolete, and the party injured in his person or goods was allowed to lay his venue where he pleased. Yet here, too, the defendant could come to the court, and, according to the practice before 1854,* it was the absolute right of the defendant to change the venue in all actions founded on simple contracts (except on bills of exchange or promissory notes) upon producing the common affidavit, namely, that the cause of action arose elsewhere. So strongly do the reasons in favour of local venues press upon the judicial mind, that so late as 1857, a Report of a Royal Commission, urging the issuing in England, of a winter commission to despatch the business accumulated between the summer and following spring circuits, dwelt on the advantages to suitors in counties neighbouring to those to which the commission may be sent, of being enabled to lay their venues nearer home, and not have to come up to the after-sittings at London or Westminster.

By the Act which came into operation in Ireland on January 1, 1864, all actions except that of ejectment being called "personal actions," it was enacted that in any personal action the venue may be in any county which the plaintiff thinks proper, power being given to the court or a judge to change it to any county in which the trial can be more conveniently or properly had, on special grounds only, and not

* Ferg. Prac., II., 883.

merely because the action occurred in any particular place or county. Let us pause to consider how this may work; during the ten years or more that this system has been in operation, the following case may have, and probably has, arisen frequently. A person little, if at all removed from destitution, has some real or fancied cause of complaint against a man of substance, and carries his wrongs for redress to an attorney, who sees that a good case can be made, a verdict had, and his costs at least secured; the sooner the better, the more the merrier, for him, of course. The parties may reside in some place to which in due time the circuit judges would come—Lifford or Ennis, far away in the south or high up in the north—but the plaintiff has a statutable right and lays his venue in Dublin. The defendant wishes to save himself the expense of taking witnesses an immense distance; he prefers to remain minding his business at home to having to wait in Dublin for the trial to come on. He feels, too, it may be, that justice would be more surely done by those who have daily knowledge of himself and of the other litigant party, in the place where reputation grows from day to day, till, by fine, indescribable but not impalpable traits, the credit to be attached to any man, be he rich or poor, and the favour to be shown to him according to his deserts, are well and generally defined. Thinking, then, that in their own neighbourhood and by their own neighbours his acts and the plaintiff's wrongs would best be measured, the defendant makes his affidavit and sets out the special grounds showing a preponderance of convenience, in which he seeks to change the venue. The motion may be resisted or it may not; if granted the costs will be costs in the cause, to increase his expenses should a verdict pass against him, never to be had from his poor opponent should the case fail; but in any case his own costs in the matter are lost to him. Such circumstances as these, which to every barrister in common law practice are by no means unusual or unfamiliar, may have incidents of oppression which have been adverted to (as will presently be seen) by some well acquainted with such facts. Yet the

increase of costs, and that unnecessarily, is the invariable attendant upon all such cases, whether the litigant parties be or be not solvent.* However, inasmuch as Her Majesty's Commissioners appointed to inquire into the superior courts of common law in England and Ireland have made this matter the subject of a portion of their report, their recommendations should first be stated. They say :—

"By the Irish Common Law Procedure Act of 1853, the venue in all personal actions, which includes any which would be local in England, is made transitory in Ireland; on the other hand, actions by and against assignees of leases have long been by express enactment transitory in Ireland whilst they are local in England. These actions might advantageously be made transitory in England, and the venue in all other classes of actions which are now local in England ought to be local in Ireland."

And they recommend :—

"That all actions (except actions by and against assignees of leases) which are now local in England should be local in Ireland." (Sec. iv., 13.)

They say further :—

"As to those actions which are transitory in England, but which are substantially, by reason of the character of the dispute and the residence of the witnesses, country causes, there is a general tendency in the practice at chambers to change the venue from London and Middlesex to the country, which tendency is caused by a reluctance to increase the burthen which the heavy *nisi prius* business in town imposes upon the London and Middlesex juries.

"In Ireland a similar reason does not exist, so that there is no balance of general inconvenience to disturb the practice which has prevailed in Ireland since 1853.

"In this case we think the Irish practice should be retained in Ireland, but not extended to England." (P. xiii.)

* It may operate usefully if it were enacted that, wherever the Court should be of opinion that the venue was improperly laid away from the county where the cause of action arose, the payment of the costs of changing the venue should be a condition precedent to the action proceeding.

With the utmost deference to the opinion of men so deservedly eminent as are those who signed that report, the question is not one of the labour imposed on jurors, whether in London, Middlesex, or in Dublin, but of convenience to suitors. Moreover the present system is one causing a preponderance of cases in one locality to be tried by one set of jurors, and tending therefore, in Ireland as in England, to increase the burthen of business upon the jurors "in town."

It is deeply to be deplored that it is not proposed to change a system of which one of the most eminent men at the Irish Bar, Mr. John Thomas Ball, Q.C., states his experience to have been that "to withdraw the case from the neighbourhood where the character of the parties and their witnesses is known, has tended to increase expense, encourage speculative actions, and make the result uncertain."

In favour, however, of continuing that system, Mr. Whiteside says:—

"I shall also mention another change in practice sometimes complained of, chiefly, I believe, by young and inexperienced professional men. No person can doubt that, *cæteris paribus*, a record will be tried more satisfactorily in Dublin by a city jury, assisted by a central bar, than on circuit in the hurry and scramble of an assizes. The old rule as to venue in transitory actions was utterly uncertain. The plaintiff laid his venue where he pleased, the defendant uniformly changed it on affidavit that the cause of action arose in some other county, a statement which, in a transitory action, was in nine cases out of ten an impalpable fiction; and then the plaintiff, in almost every case, moved to restore or retain his venue on special grounds of convenience, or on conflicting affidavits as to residence of witnesses.

"Some classes, *e.g.*, attorneys, had peculiar privileges as to venue denied to other persons. Now, nothing finally controls the venue but the relative convenience of the place for trial, and where no reasons can be offered to turn the balance, the suitor naturally has the choice. Thus a multiplicity of idle notions, sustained by hard swearing and at a great expense, are cut short, and, as a general

rule, the important records are tried at Dublin, where, for obvious reasons, the suitor prefers to have his case tried. He escapes the hurry and confusion of an assizes, the time of despatching the reduced business of these assizes being frequently inconveniently short." (Pp. 108-9.)

The system, too, has in its favour the weight of the opinion of the present Solicitor-General (Mr. Sullivan), who gives it the preference over that in England.

On the other hand, Master Fitzgibbon, Sir Colman O'Loghlen, (Third Serjeant), Dr. Battersby, Q.C., Dr. Ball, Q.C., Mr. Hemphill, Q.C., Mr. Morris, Q.C., and others condemn the present system.

To comprehend their reasons the following may be cited; they are the opinions of members of different circuits:—

"I think the system in Ireland which enables a plaintiff to lay the venue where he pleases, and throws on the defendant the necessity of making a special case in order to change such venue, is faulty to an excess; it throws the burden on the wrong party.

"I would suggest that the defendant be at liberty, as heretofore, before the Common Law Procedure Act, to change the venue by motion, without notice, on the common affidavit, and then to enable the plaintiff, upon a proper case, to bring back the venue to the place he originally laid it.

"I have been in cases where a defendant has been obliged to bring all his witnesses to a distant county, although the plaintiff, who was confessedly a pauper, and all the plaintiff's witnesses, resided in the same county with the defendant.

"The only convenience often suggested is that a trial can sooner be had in the county where the venue was laid by the plaintiff, than in that where the cause of action arose, a convenience which a plaintiff can always secure, as he can select the time for bringing the action. I do not think that convenience to the plaintiff an equivalent for the mischief arising from pauper and disreputable plaintiffs bringing speculative actions, laying the venue in counties where their position and character are unknown.

"I have known instances of successful experiments of that nature

where the action would never have been brought if the case should be tried in the place where the plaintiff's character, and that of his witnesses, were known ; and I have likewise known instances where such actions were abandoned, on the venue being changed to the proper county." (Henry Concanon, Esq., barrister-at-law. *Connaught Circuit*, p. 119.)

"I cannot too strongly or forcibly express my opinion upon the injurious results of the provision as to 'venue,' Irish C. L. Proc. Act, section 72 ; I have heard it stated it was the concoction of some leading practitioners of both branches of the profession at Dublin *nisi prius*. I know that parties bring actions and lay their venues in Dublin, where they are not known, and which they never intend to proceed with, if the defendant, escaping the special demurrers to a motion to have the case tried in the vicinity, meets the capricious views entertained of the words 'more conveniently and properly tried.' A defendant cannot, in the very plainest case for so doing, apply to change the venue until after his defence is filed, often, not until notice of trial is served. Possibly, the defendant's affidavit has not been revised by counsel, nor the stereotyped statements introduced, which various cases have decided to be indispensable. Perhaps a hardy plaintiff meets the defendant's case by a counter affidavit, that necessary witnesses are resident at the venue selected, the audacity of which assertion many judges will not question or consider : then the usual platitudes of counsel, of plaintiff's statutable right to select any absurd venue ; and, finally, a decision often on very fanciful reasons. The plaintiff, at the worst, has his costs in the cause, even when the motion of the defendant succeeds, and I have known a venue deliberately selected to drive the defendant to a motion to change, thus mulcting him with costs." (Michael Morris, Esq., Q.C., *Connaught Circuit*, p. 126.)

"I would suggest that an error was committed in allowing plaintiffs in all cases to lay the venue in any place they chose. The difficulty at present in changing the venue from the place where the plaintiff has laid it to the place where cause of action arose, and where all parties reside, is very great. Defendant is invariably met with arguments that plaintiff is not (on slight grounds) to be deprived of right given him by statute ; that convenience is to be estimated by expense, which can be calculated by the railway fares,

and amounts to so trifling a sum that the court should not regard it; and that plaintiff would be delayed if venue was changed. These arguments generally prevail; and in my opinion, the practice of laying the venue in a distant locality has become, in any cases, a real persecution; and I feel satisfied that the facility afforded in having a trial far away from the county where parties reside, multiplies a class of actions which should never be brought, and would never be brought in the assize town and before a jury of the county. The practice in England in this respect is much better than that in Ireland. The old practice of allowing venues to be changed on common affidavit was, in my opinion, a very salutary one." (James Murphy, Esq., Barrister-at-law. *Munster Circuit*, p. 127.)

"As to the 'venue,' I should have all actions *prima facie local*, except such as are now triable in the 'Consolidated *nisi prius* Court in Ireland,' reserving to the judges, of course, the most ample powers of changing the venue on special grounds. Under the present system enormous expense is incurred in bringing to Dublin witnesses from remote parts of the country. The expenses of witnesses are generally found to be the heaviest item in bills of costs. Again, special juries are constantly resorted to in Dublin in cases which, if tried in the country, would probably appear in the common jury list, which is in itself a great additional expense to the suitor; moreover, the class of jurors attending the assizes are, generally speaking, more competent to deal with the evidence of country witnesses than can be reasonably expected from Dublin juries. I never could understand on what grounds this great latitude as to venue was introduced into Ireland, repugnant alike to the old law and the modern practice in England." (Charles H. Hemphill, Esq., Q.C. *Leinster Circuit*, p. 115.)

It is, then, to be regretted that the tendency of the Commissioners' report should not be in favour of localising venues in Ireland. The Bar have no reason to object to increasing business on circuit; for some time past they have had reason rather to deplore the want of it. With their attention to the legal business legitimately belonging to the seats of the courts of judicature the trial of issues of fact is calculated rather to

interfere. Moreover, a well-grounded complaint has come from the profession and from the public, as to the juries in Dublin being almost habitually constituted of the same class, of men who frequent the courts, not of persons taken indifferently from the large number who must be on the jury panel in so large a population as that of Dublin. This fact is notorious; so notorious as to have formed the subject of public comment there, alike from the Bench and the Bar very recently.*

Nor should it be lost sight of, that by taking away the investigation of disputes from the places where they arose, the means of creating and protecting the exercise of public opinion are disregarded. Alike the plaintiff and defendant, if conscious of misconduct and dreading publicity, will seek for a trial as far from the knowledge and observation of their ordinary associates as they can. For every reason, then, the administration of justice, should be localised, not centralised; and if it be apprehended that the trial of causes in the very locality where all the parties are known, where, often it may be, the circumstances of the case have been discussed, may taint verdicts with partiality; if it may seem that such incidents are calculated to "prejudice the minds of men who ought to come to compose a jury without any preconceived opinions to decide upon the subject;" such fears may be calmed by the assurance to be found in Lord Kenyon's words, words spoken in a proud confidence in the law which it was his noble function to administer:—

"The constitution of this country has done all that human prudence can do, that justice should be administered by those who have no wishes on the subject; it is for that reason that various challenges are given by law to a juryman. A relation, in however remote a degree, cannot sit upon a trial, and yet the law does not mean to say that all the relations are villains. The challenge is not deemed a

* Court of Common Pleas; Easter Term. *O'Brien* v. *Kilbee;* a motion to change the venue from Dublin. The conduct of the juries in certain cases tried before the Lord Chief Justice Cockburn, in the sittings after Trinity Term, formed the subject of strong comment in the *Times.*

scandalous attack, it is enough to say general rules must be laid down, adapted to the case of evil men and good men. If by possibility evil may creep in, shut the door as close as you can; the law, I say, has done as much as human wisdom can do to keep the streams of justice pure and entire." (21 State Trials, 871.)

ART. II.—THE LAW OF THE DRAMA.

WHEN, a few months ago, the managers of certain of our metropolitan theatres entered upon what has been called their "crusade" against the proprietors of music halls, for giving certain entertainments without a stage-play license, probably they and the public generally did not expect the matter to go much beyond the precincts of the police courts.

But as has often happened in the world's history, events apparently trivial become the pioneers of great reforms, and persons acting solely from selfish motives are frequently much against their will, productive of great benefit to mankind, so this little cruise of the theatrical managers has been but the prelude to another of somewhat greater dimensions, which in its results may go far to swamp the little craft that has been the means of guiding it into public view. The subject has wandered from the care of the facetious stipendiary, and after maintaining a sort of precarious and fitful existence among the leaders of the daily press, has at last found its way into the precincts of St. Stephens. And though the measures introduced there have not become law this session, still the question of free-trade or monopoly in the drama must receive a decisive answer before the subject is allowed to rest. Most of those who have taken up the cudgels against free-trade in the drama have treated the subject in a way such as to show that their knowledge of it was conspicuous by its absence. As it is a matter on which little has been written, and which seems in anything but a settled state, but is nevertheless of considerable interest to many, we have thought the present an

opportune occasion on which to present to our readers some account of the legislation anent the followers of the histrionic art.

In former times the only actors or players seem to have been those companies attached to the Royal Court or the houses of great nobles, who, when their services were not required by their lords, received patents or licences from them to wander through the country and act in the various towns and villages. The earliest mention of professional players occurs about the beginning of the reign of Edward IV., where in the year 1464 a sumptuary law of that monarch makes an exception in favour of "players in their interludes." His brother the Duke of Gloucester, afterwards Richard III., is said to have been the first prince who kept a company of players in his pay. Henry VII. had two companies of players attached to his court; the one the "Gentlemen of the Chapel," called also the "Children of the Chapel," who performed at certain stated seasons, and were always about the court; the other, "The players of interludes," who corresponded to the strollers of later times, and who, when not engaged at court, received licenses to play in different parts of the country. During the reign of Henry VIII., the court amusements seem to have become more expensive, and salaries were paid to two companies of the "King's players," in addition to the "Children of the Chapel;" and these "King's players," and those also of the nobles, seem to have gone through the country as strollers. In this reign, in 1543, the first Act for the regulation of the stage is said to have been passed, and in the same reign, two years later, was first permanently established the office of Master of the Revels, of whose relation to the players and their plays we shall speak more at length anon.

These companies of strollers, who wore the badge and livery of their masters, seem frequently to have led a rollicking vagrant sort of life, and to have occasionally assumed the character of beggars; and Henry VII. is said to have given gratuities to "players who begged by the way." They seem

sometimes to have ventured to show the ridiculous side of matters of state in their interludes, and in 1556 the attention of the Lord President of the North was directed to the circumstance that "certain lewd persons naming themselves to be servants of Sir Francis Lake, and wearing his livery or badge on their sleeves, have wandered about these north parts, and representing certain plays and interludes reflecting on the queen and her consort, and the formalities of the mass." (Strype's *Ecclesiastical Memorials*, Vol. III., Appendix p. 185.) In the beginning of the reign of Elizabeth the contumacious players attempting to take similar liberties with the Protestant religion, the statute 1 Eliz. c. 2, sec. 9, was passed to restrain their vagaries. By it a penalty of 100 marks was imposed upon all "persons who in plays and interludes declared or spoke anything in derogation, depraving or despising of the Book of Common Prayer." .The licenses under which the strollers acted were intended chiefly as a protection to them against prosecutions under the laws relating to vagrants; and, as a consequence of the immunities and privileges enjoyed by them, many idle and disorderly persons called themselves strollers in order that they might be protected from the penal enactments. During the reign of Elizabeth these companies of strollers, and the sturdy beggars who called themselves such, had increased so much, and their irregularities had become so dangerous, that in 1572 it was deemed necessary to pass the 39 Eliz. c. 4, which enacted that all

"Common players of interludes, and minstrels wandering abroad (other than players of interludes belonging to any baron of the realme, or any other honourable personage of greater degree, to be authorized to play under the hand and seale of arms of such baron, or personage) were to be deemed rogues, vagabonds, and sturdie beggars."

James I too passed an Act (3 James I., c. 28.) "To restrain the abuses of players," and imposing a fine of "tenne pounds" on all players who should indulge in profane jesting.

By the 1 Charles I., c. 1, "Interludes and Common Plays," were forbidden to be acted on the Lord's Day; and in 1648, the 23 Charles I., c. 93, was passed, empowering the Lord Mayor, &c., to enter houses where plays were performed, and take the performers into custody. By the Act of the same year, chap. 106, it was enacted that all strollers should be publicly whipped in the market-place of any town, the seats and benches of any playhouse demolished, and the spectators fined. These acts, however, seem to have been more honoured in the breach than in the observance, by the contumacious players, who had occasionally to taste the cat-o'nine-tails as the reward of their hardihood, and a powerful auxiliary to their melo-dramatic powers. Whitelocke, in his Memorials, relates, under date 20th December, 1649, that "Some stage-players in Saint John's Street were apprehended by troopers, their clothes taken away, and themselves carried to prison." As the Red Bull theatre was in Saint John's Street, this incident may possibly have taken place there.

On the 3rd February, 1653-4, a company of strollers acted the play of *Mucedorus*, at Witney, in Oxfordshire, where, though there was no interference by the authorities, an accident of a somewhat serious nature took place, which brought the fun to an abrupt conclusion. This was commemorated in a tract entitled "*Tragi-Comœdia.*" "Being a brieff relation of the strange and wonderful hand of God, discovered at Witney, in the comedy acted February the 3rd, where there were some slaine, many hurt, and several other remarkable passages, &c."

Another infringement of these Acts is also mentioned by Whitelocke in the following entry, "January, 1655-6. Players taken in Newcastle and whipped for rogues."

The production of Davenant's opera of *The Siege of Rhodes*, in 1656, is generally considered to have been the first step towards the revival of dramatic performances, a work which was fully inaugurated by the change in manners, following in the wake of the restoration of Charles II. Three years after the production of Davenant's opera, two rival companies

began to act in London, the one at the "Cockpit", the other at the "Red Bull;" and among the company at the former, were Betterton and Kynaston.

With the revival of theatrical entertainments after the Restoration, a great number of irregularities made their way on to the stage, and in Queen Anne's reign these had increased to such an extent, that about 1713 it was deemed expedient to include all players of interludes in the Vagrant Act. By the 12 Anne, stat. 2, c. 23, for consolidating the vagrant laws, "All fencers, bearwards, common players of interludes, and other persons therein named and expressed," are to be deemed rogues and vagabonds. The 10 Geo. II., c. 19, prohibited players from acting within five miles of Oxford and Cambridge, and then came the 10 Geo. II., c. 28 (passed in 1737), which up to very recent times was the great Act governing plays and players. This was the first Act which treated the player as an independent member of the community (though not completely recognised as such till the passing of the 5 Geo. IV., c. 10), devised something like a comprehensive measure for the subjects of his art, and defined and established the Lord Chamberlain's authority over theatres. It may be looked upon as the connecting link between the legislation of the past which classed the poor strolling player with the "sturdie beggar" and the vagabond, and the more liberal measures of modern times which have taken him from the hall of the patron and given him a recognized status in society, and as being therefore a convenient halting place where we may take a last look at his early state before we turn our attention to him in his altered condition.

From the earliest times, after the wandering minstrel had, so to speak, given place to the professional actor, up to the passing, in 1737, of the 10 Geo. II., c. 28, the "players of interludes" and their entertainments were under the superintendence of an officer of the royal household called the Master of the Revels. This officer was of old appointed by the king or queen (in whom alone, up to the passing of

the 10 Geo. II., was vested the power of licensing companies of players by patent under the great seal), and his duties originally were to superintend the performance in the king's palace, to take care of the masks and dresses used in these entertainments, and to provide new ones when necessary. The superintendence of the King's palace belonged to the Lord Chamberlain, and the Master of the Revels being a sort of household officer, he and his department came to some extent under the jurisdiction of the Lord Chamberlain. He was also controlled in some degree, and under certain circumstances, by the Privy Council and Star Chamber, which consisted of the members of the King's *consilium ordinarium*, and took cognizance of any misdemeanours committed by this officer or those under his control.

The first mention of the Master of the Revels, as a permanent officer, is in the year 1545, in the reign of Henry VIII. The first on record was Sir Thomas Cawarden, the second Sir T. Berenger, and the third Edmund Tylney, who filled office during the latter part of the reign of Queen Elizabeth and the beginning of that of James I. He was the first who exercised any authority in licensing and correcting plays that were publicly acted—and this he did much in the same way as it is done at present, by reading the plays and expunging offensive passages. In the reign of James I. Sir Henry Herbert acted as deputy to Sir John Ashley in 1622, and afterwards on his own behalf in 1627. He was authorised to exercise the most complete control over players and plays, and could close any theatre either temporarily or permanently; could interdict the representation of any play, and prevent any company of players from acting.

The control of the players being thus placed in the hands of the Master of the Revels, it is probable that he, as the deputy of royalty in these matters, began to grant licenses to itinerate to the companies of players of interludes as early as the time of Henry VIII., if not before that time. We have already mentioned that Henry VII. is said to have given alms to

"players that begged by the way," and that there were players in the pay of a nobleman itinerating in the reign of Mary; and, when we come to the time of Elizabeth, we have not only the strollers with the royal license, but the players belonging to the nobles who in her reign had the power granted them of giving licenses to their own companies. In Malone's *Historical Account of the English Stage*, we have an account of how the strollers, in Elizabeth's time, got permission to act in any town they came to. "When players of interludes come to the city of Gloucester, the manner is, as in other like corporations, that they first attend the mayor to inform him what nobleman's servants they are, and so to get license 'for their public playing.'" In Kelly's *Notices of Leicester* we have a somewhat similar account of the manners of the strollers who came there in those days, and the following may be enumerated as among those who were in the habit of visiting Leicester in this and the succeeding century. "The Lord Strafford's players, the Lord Shandoe's, the Earl of Huntingdon's, the Lord Albanye's, the Earl of Essex's, the Lord Marquess his players, the Earl of Worcester's, Terry and his Companye having large aucthoritie," &c.

It was usual to have a stage erected at all those towns that the strollers were in the habit of visiting, and we frequently find mention made of the "keeper of the town stage," even up to the end of the sixteenth century. In those times, too, when moveable scenery was unknown, and the imagination of the spectator was more appealed to than the eye, it would be easy for the "players of interludes" to move from town to town. As Covey says in the prologue to his *Generous Enemies* (1672):

> "Your aged fathers came to plays for wit,
> And sat knee-deep in nutshells in the pit:
> Coarse hangings then, instead of scenes, were worn,
> And Kidderminster did the stage adorn."

The earliest royal theatrical license extant, was one granted by Elizabeth, in 1574, to James Burbage and four others,

"servants to the Earl of Leicester," to act plays at the Globe theatre, or in any part of England. It directs that the performances authorized by it, are to be seen and allowed by the Queen's Master of the Revels before they are publicly represented.

As "the Theatre," and "the Curtain," had been built some four years previously, it would seem probable that there had been some royal licenses granted to them previous to that granted to Burbage. Shaw, in his "Survey of London (1599), refers to them, "Neare adjoyning are builded two howses for the shewe of activities, comodies, tragidies, and histories, for recreation; the one of them is named the Curteyn in holy well, the other the Theatre: these are on the back syde of holy well, towards the filde." In 1613, Sir George Buc, the Master of the Revels received £20 for granting a license for the Salisbury Court Theatre. In 1624 occurs the first instance in which the name of the Lord Chamberlain is mentioned, in connection with the control of the players. In that year the "king's players" had given offence, by acting a play called the *Game of Chess*, and in consequence thereof had been fined by the Privy Council, and the Lord Chamberlain was instructed by the king to remit the sentence. In 1630, we have an instance of the Master of the Revels refusing to license a play by Massinger, "because it did contain dangerous matter;" but he naively remarks, "I had my fee notwithstanding, which belongs to me for reading it over, and ought always to be brought with a book."

About the year 1641, Beeston applied to the Master of the Revels for his authority "to continue the house, called Salisbury Court Playhouse, as a playhouse." Sir H. Herbert, in his license goes very minutely into his powers over theatres and players, and we will, therefore, give it verbatim:—

"For Mr. William Beeston."

"Whereas the allowance of plays, the ordering of players and playmakers, and the permission for erecting of playhouses, hath time out of minde, whereof the memory of man is not to the contrary,

belonged to the Master of his Ma^ties^ office of the Revells; and whereas Mr. William Beeston hath desired authority and lycence from mee to continue the house, called Salisbury Court Playhouse, as a playhouse, which was formerly built and erected into a playhouse by the permission and lycence of the Master of the Revels.

"These are, therefore, by virtue of a grant under the Great Seal of England and of the constant practice thereof, to continue and constitute the said house, called Salisbury Court Playhouse, into a playhouse, and to authorize and lycence the said Mr. Beeston to sett, lett, or use it for a playhouse, wherin comedies, tragedies, tragicomedies, pastoralls, and interludes, may be acted. Provided that noe persons be admitted to act in the said playhouse, but such as shall be allowed by the Master of his Ma^ties^ office of the Revells. Given under my hand and seale of office of the Revells, this."—(No. date.)

From this it would appear that the Master of the Revels exercised complete control, not only over theatres and the entertainments given there, but over the players themselves, although Collier seems to incline to the opinion that his duties were confined to the licensing of *theatres*, the players being licensed directly from the Crown. It would also seem that puppet-shows were at one time under the care of a distinct officer, called the sergeant-trumpeter, who received his appointment from the Lord Chamberlain, but his office has long since been extinguished. In the reign of James I., the Act of Elizabeth, under which "Barons of the realme" had the power of granting licenses to their companies of players to itinerate, was repealed, and the sole power of doing so again reverted to the Master of Revels as of yore.

In 1660, the authority of the Master of the Revels to interfere in matters affecting stage-plays and theatres was called in question, but he succeeded in asserting his privileges.

Charles II. appointed Thomas Killigrew and Charles Killigrew as his Masters of the Revels, but after his time we do not find any mention of the office, though it is considered to have existed up to 1787, concurrently with that of the Lord Cham-

berlain who, as we have already mentioned, first exercised any authority over the players in 1624.

In 1662, Charles II. granted two royal patents, which are generally considered to be the origin of the present monopoly. One of these patents was in favour of Davenant, whose company was styled the Duke of York's Company, and acted first at the theatre in Lincoln's Inn Fields, and then at Covent Garden; the other was in favour of Killigrew, who acted with the King's Company at Drury Lane. These patents to Drury Lane and Covent Garden are still in force, and during the reign of Charles II. were the only two patent theatres within London and Westminster. In order to prevent the one from encroaching on the other, it was provided that any player leaving one of the companies should not be engaged by the other without the consent in writing of his late employer. The patents then go on to say,

"We doe hereby strictly command and enjoine that from henceforth noe new play shall bee acted by either of the said comps., conteyninge anie passages offensive to piety and good manners, nor any old or revived play conteyning any such offensive passages as aforesaid, untill the same shall be corrected and purged by the said masters or governours of the said respective comps., from all such offensive and scandalous passages as aforesaid. . . We doe likewise permit and give leave that all the women's parts, to be acted in either of the said two comps., for the time to come, may bee performed by women, so long as these recreations may by such reformation bee esteemed not only harmless delight, but useful and instructive representations of human life."

These two companies afterwards became united from 1684 till 1694. From this time forward, as the number of players rapidly increased, royal licenses to companies of players began to be granted pretty freely, till in 1735 the increased number of unlicensed theatres (six in number), and the scandalous nature of the performances (some say Fielding's *Pasquin*, others *The Golden Rump*, and some Gay's *Beggar's Opera*, was the more immediate cause of the act) induced Sir John Barnard

to bring in a bill "To restrain the number of houses for playing of interludes, and for the better regulating of common players." It being proposed to introduce a clause to confirm the Lord Chamberlain's power in licensing plays, which of late years had fallen into disfavour, and been much disregarded and disputed, Sir John Barnard, who disapproved of the Lord Chamberlain's jurisdiction, abandoned the bill. Two years afterward's, however (1737), Sir Robert Walpole introduced and carried the 10 George II., c. 28, the first Act of Parliament which defined the duties of the Lord Chamberlain, and completely established his authority.

This 10 George II., c. 28, was "An Act to explain so much of 12 Anne, s. 2, c. 23, as relates to common players of Interludes." The statute of Anne referred to had enacted among other things things that "All fencers, bearwards, common players of interludes, and other persons therein named and expressed," were to be deemed rogues and vagabonds. By this Act of 10 George II. no plays could lawfully be acted for hire in the city of Westminster and its liberties, or within twenty miles of London, without a patent from the King or a license from the Lord Chamberlain. But, in a few years afterwards, this restricted power of granting patents by the crown being found productive of inconvenience, special acts of parliament were passed enabling the King to grant patents for establishing theatres in various large towns, which power was exercised at different times in the cases of Edinburgh, Glasgow, Bath, Norwich, York, and Kingston-upon-Hull, Liverpool, Manchester, Chester, Bristol, Margate, Newcastle-on-Tyne, Birmingham, and Dublin. In all parts beyond the limits we have just mentioned, power was afterwards given by the 28 Geo. III., c. 30, to magistrates in sessions to grant licenses for theatrical performances; and as, by sec. 5 of the 10 George II., the power of the King and the Lord Chamberlain in these matters was limited to the city and liberties of Westminster, or where the King might happen to reside, it was held that in places within twenty miles of London, and not within these provisoes,

no theatre could be legally opened (*Rex* v. *Neville*, 1 B. & Adol. 489). At this time the theatres which had patents from the crown were Drury Lane Covent Garden, and the Haymarket, and to them was granted the exclusive privilege of acting the legitimate drama, whatever that may mean. As the minor theatres in London and its neighbourhood were most of them beyond the Lord Chamberlain's jurisdiction, and not within that of the magistrates, and those of them who happened to be within the liberties of Westminster could not get a license, they tried to get over the difficulty by obtaining a license for music and dancing from the magistrates under the 25 Geo. II., c. 36. Under this license Sadler's Wells, the old Coburg, and the other minor theatres acted what were called burlettas and melodramas in a kind of operatic *recitative* to the accompaniment of the piano, which was kept playing the while to avoid infringing the licensing act, and, as they thought, to convert them into musical performances. They evidently thought that so long as there was a sort of "musical row" going on, they could act anything they pleased. The legislature, however, seems to have taken a different view of the matter, and in the year 1839, gave the metropolitan police some additional powers by the 2 & 3 Vict., c. 47. Under the 46th section of that Act, "The commissioners of police are empowered to authorise a superintendent, with such constables as he may think necessary, to enter into any house or room, kept or used within the metropolitan police district, for stage-plays or dramatic entertainments, into which admission is obtained by payment of money, and which is not a licensed theatre, and to take into custody all persons who shall be found therein without lawful excuse." This mode of procedure does not seem to have been very palatable to those whom it concerned, and, in consequence of their complaints and numerous petitions to the House of Commons on the subject, a select committee was appointed in 1831 to inquire into the state of dramatic literature. This committee, after a long inquiry, and after examining most of those throughout the

country who were conversant with the subject, issued their report in 1832, in which they recommended the abolition of the exclusive privileges of the patent theatres, and the throwing open of the trade in them. These recommendations were afterwards carried out in 1843 by the 6 & 7 Vict., c. 68, which now has the care of all matters theatrical. It is intitutled "An Act for Regulating Theatres," and, after reciting that it is "expedient that the laws now in force for regulating theatres and theatrical performances be repealed," it goes on to repeal the 3 James I., c. 21, part of 10 Geo. II., c. 19, 10 Geo. III., c. 28, and 28 Geo. III., c. 30. Under this Act no theatre can legally be opened within the parliamentary boundaries of London and Westminster, and within the boroughs of Finsbury and Marylebone, the Tower Hamlets, Lambeth, and Southwark, or within those places where the sovereign shall occasionally reside, without either a *patent* from the crown or a *license* from the Lord Chamberlain. In all places beyond these limits, before a theatre can be opened, a *license* must be obtained from at least *four justices*, assembled in special session in the division where the proposed theatre is to be situated; but no license is to be in force at the universities, or within fourteen miles thereof, without the consent of the Chancellor or Vice-Chancellor.

We have already stated that the 10 Geo. II. was the first legislative enactment which defined the duties of the Lord Chamberlain in reference to theatres. By the 3rd section of that Act it was enacted that from and after the 24th June, 1837, no person was to act, or cause to be acted "any new interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any parts therein," unless a copy had been sent to the Lord Chamberlain fourteen days before its production, and allowed by him. Under this Act an officer called the Examiner of Plays was appointed, at a nominal salary of £400 a year, who acted as the deputy of the Lord Chamberlain in licensing plays. One of the first plays rejected by the examiner was Thomson's *Edward and Eleanora* in

1740; Reed's *Register Office* was also refused a license in 1761. Colman, who was appointed Examiner of Plays in 1824 (in the room of John Larpent) does not seem to have given much satisfaction to the playwrights of the time, as the following from Oxberry's *Dramatic Biography* will show:—

"A list of the (im)moralities of the present moral and fastidious licenser of the stage.

"THE IRON CHEST."

"BY GEORGE COLMAN THE YOUNGER."

"Act 1.—Scene 1.—Part of the speech of *Samson*:—

"Well, your rich men have no bowels for us lowly,—they little think, while they are gorging on the fat haunch of a goodly buck, what fatigues we poor honest souls undergo in stealing it."

Marry, what have we here!—can this idea ever have been written upon paper by the private reviewer of *Alasco?*—no positively—it must have been some radical interloper who has committed himself by this piece of satire on the ministers, &c. Such contamination as this was expunged by the ever-to-be-remembered glorious red ink in poor Shee's *Alasco.*

One objection to the *Guerilla* being produced in its original state was on account of the numerous situations which agreed with the present affairs in Ireland. The author was obliged, if he wished it acted, to revise and throw the scene into Spain; this was done, and it was performed at the English Opera House. *The Curse of Kavanagh* and *Captain John Rock,* founded on the same tale, with the same dialogue, but with Irish scenery, characters, and that too with the wild Irish, the White Boys—were represented; the first at the Surrey Theatre, with tremendous applause, and a run of two or three months; and the other at the Coburg.

The Lord Chamberlain and his examiners are still the censors of the dramatic literature of the country, under the 6 & 7 Vict., but the time before production on the stage within which plays must be sent in to him is now limited to seven days, and his jurisdiction as to the examination of plays is (by

section 12) extended to the whole of the United Kingdom, including the Channel Islands.

Under the 6 & 7 Vict., c. 68, the word "stage-play" is defined as including "every tragedy, comedy, farce, opera, burletta, interlude, melodrama, pantomime, *or other entertainment of the stage or any part thereof;*"—"but not a theatrical representation in a booth or show duly allowed by the justice of the peace, or other person having authority in that behalf, at a fair or feast, &c." (sec. 23.) As the words "other entertainment of the stage" are used in the defining section of the Act of Geo. II. as well as in that of the present reign, the decisions under that section of the former statute are of course applicable in the present day. And though, as the "crusade" of the theatrical managers against the music halls is not yet at an end, it would not become us to express any opinion either *pro* or *con*, on the course they have pursued; yet, with the aid of cases decided under the Act of Geo. II, we think we may safely approach the consideration of the now vexed question, What is an entertainment of the stage?

When the 10 Geo. II. was passed, melodramas and burlettas were unknown; and tumbling was not introduced at Sadler's Wells (its cradle in England) till some years after. As the legislature could scarcely be expected to have made provision for these unborn children, adventurous spirits thought these, at least, might dispense with the Lord Chamberlain's attention. However, the managers thought otherwise, and even disputed a man's right to stand on his head without a license, and so the aid of the courts was invoked to decide between them.

The first case of any importance which came before the courts occurred about the year 1793, when the case of *Gallini* v. *Laborie* (5 T. R. 242) came before the Court of King's Bench. Laborie had entered into an engagement to come over to England to dance *ballets* in the Italian Opera at the "King's Theatre" in the Haymarket, and at some other places belonging to Gallini. Laborie never came at all, and in an

action against him for breach of contract, it was objected on his behalf that these other places were not licensed by the Lord Chamberlain, and dancing being an entertainment of the stage, it would have been illegal for him to dance *ballets* at these places. Gallini, of course, denied that dancing was a stage entertainment, and so the opinion of the court was taken on the matter. Lord Kenyon, in delivering judgment, said:—

"I think the statute 10 Geo. II. does extend to this and every other species of stage entertainments. . . . The clause requiring a copy of the entertainment to be previously given to the Lord Chamberlain, of course can only apply to such entertainments as are recited from written performances, and was intended as an additional check against a licentious use of the stage. No entertainment of the stage, *of which dancing is one*, can be exhibited without the Lord Chamberlain's license."

In 1795, the Court of King's Bench was again called upon to give its opinion as to whether *tumbling* was a stage-play or not (The *King* v. *Handy*, 6 T. R. 286.) An acrobat named Banjamin Handy had been fined £50 for "acting, representing, and performing a certain entertainment of the stage, called tumbling," at Birmingham. The conviction was removed by *certiorari* to take the opinion of the King's Bench on the question whether tumbling came within the statute. Lord Kenyon said:

"I do not think that *tumbling* is an entertainment of the stage within the meaning of that Act of Parliament (10 Geo. II.) It might equally be said that *fencing* on a public stage is. By the third section of this Act, a copy of the piece to be represented is required to be sent to the Lord Chamberlain, for his approbation previous to acting; but no copy could have been given of this entertainment."

In the course of the argument it was observed, after adverting to the fact that tumbling was not known when the Act was passed, and that there was nothing historical represented in tumbling,—"Dancing at the Opera House is an historical

representation, in which characters are exhibited, and therefore it may be made the vehicle of indecent or immoral representations."

North of the Tweed, however, where possibly the puritan element may have had something to do with it, they seem to have gone further than the English courts in giving a wide interpretation to the words of the statute. The first case, so far as we are aware, that came before the Scotch courts was one in which the well-known name of Mrs. Siddons appears as the aggrieved party (*Siddons* v. *Ryder*, 3 S. & D. 397). In the year 1820 Mrs. Siddons obtained the absolute right to the letters-patent under which the Theatre Royal, Edinburgh, had been established. Soon after, one Corbet Ryder opened what was called the Caledonian Theatre, which was not licensed, for the performance of melodramas and burlettas. Mrs. Siddons having applied to the Court of Session for an *interdict* against Ryder, he contended that his performances did not fall under the 10 Geo. II., and the court had, therefore, to decide the question. In delivering the judgment of the Court, Lord Glenlee said, "There can be no doubt as to the interludes, tragedies, &c., specially mentioned in the Act; and as to melodramas and burlettas, the words 'other entertainments of the stage,' are general enough to include such performances. Undoubtedly, to fall under the Act, such entertainments must be of the same nature with those previously specified in it, but melodramas truly are so."

The lessee of the Glasgow Theatre Royal next found it necessary to apply to the court to protect his privileges from being infringed upon in a somewhat similar manner (*Alexander* v. *Anderson*, 4 B. M. & D., 1525). By the 43 Geo. III., c. 142, a patent had been granted to the Theatre Royal, Glasgow, which theatre was unfortunately burned in 1829. In the year 1830 new letters-patent were granted, giving to the patentees the exclusive privilege for forming a company of comedians for performing such plays as the Lord Chamberlain

had or might permit. One Alexander became lessee of the letters-patent. In the spring of 1841, a person named Anderson fitted up a large wooden building in Glasgow, which in the handbills was called "The Glasgow Minor Theatre, late Cooke's Circus, Glasgow Green." In this he represented melodramas, asd other minor theatrical entertainments, *e. g.*, "The Dumb Orphan of Genoa," "The Idiot Witness," "Gilderoy," &c. Alexander thereupon applied to the Court of Session for an interdict against the performances, and Anderson pleading that they did not come under the description requiring to be licensed by the Lord Chamberlain, the court was accordingly called upon to decide.

The Lord Ordinary (Cunningham) said:—

"The Act of Geo. II. prohibits all entertainments of the stage from being performed which are not licensed. . . . He exhibits burlettas, ballets, and melodramas. It is for the court to judge whether these are not entertainments of the stage in the sense of 10 George II."

The Lord Justice Clerk (Hope):—

"There can be no entertainment which ought not first to be submitted to the Lord Chamberlain. . . . No argument can arise to the respondent from the statutory provision as to places of amusement for public dancing, music, and other public entertainments of the like kind. I think that licenses under that Act were not intended to warrant any exhibition or representation whatever carried on by acting. The judgment in the case of Gallini is sufficient for this case. I think that the first opinion of Lord Kenyon was the better opinion, and that every entertainment on the stage is prohibited by 10 Geo. II. The only question is, whether the performance is an entertainment of the stage. Now, what is the stage? It refers to the exhibition of acting, or representation of fictitious scenes by the performance of parts. Mere fencing alone is not representation; but if parties are advertised to fence, or do fence, dressed up in characters, though no name is given to such characters —dressed up in fantastic dresses, so as to make a scene by aid of the dresses—then there is scenic effect superadded to the fencing. As

to tumbling, I should wish not to be understood as concurring in the opinion that it may not by possibility be brought within scenic representation or scenic effect, of however low a character. But wherever there is scenic representation or dramatic effect, of whatever kind, I apprehend that is an entertainment of the stage."

These, so far as we can collect them, are the principal cases which arose under this Act of George II.; and probably the reader is of opinion that they are sufficient to indicate a disposition on the part of the courts to extend the sphere of its operations as far as they possibly could; so that it would be difficult for any one to say, *prima facie*, what species of composition or entertainment did not come within its purview.

Under the Acts 3 & 4 Will. IV., c. 15, and 5 & 6 Vict., c. 46 (both relating to the law of copyright), a case of some importance in reference to the subject we are considering, came before the courts. Under these Acts, "a dramatic piece" includes "every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment;" and under this section the case of *Russell* v. *Smith* (12 Q. B. 217) came before the court in 1848.

Mr. Russell brought an action against Smith for representing a musical composition called "The Ship on Fire," at Crosby Hall, Bishopsgate, in the City of London. Crosby Hall belonged to a literary society, and had a music license under the 25 Geo. II., c. 36. There were seats for the audience and a platform for Smith, who accompanied himself on the piano; but there was no scenery or characteristic dress. In the bills the piece was described as a "descriptive scene, 'The Ship on Fire:' words by Charles Mackay, Esq. This scene is founded on the loss of the 'Kent' East Indiaman, which was totally destroyed by fire in the Bay of Biscay." Lord Denman, delivering the judgment of the Court of Queen's Bench, said:—

"We are of opinion both that the 'Ship on Fire' was a dramatic piece, and that Crosby Hall became upon the occasion of this per-

formance, a place of dramatic entertainment within the meaning of these statutes. It represents a storm at sea, the burning of the ship, and an escape by boat to another ship, and so a safe return to land. It moves terror, and pity, and sympathy, by presenting danger, and despair, and joy, and maternal and conjugal affection. Thus, the nature of the production places it rather in the representative than the narrative class of poetry, according to Lord Bacon's division of dramatic from epic. The words 'any other dramatic entertainment,' comprehend any piece which, on being presented by any performer to an audience, would produce the emotions which are the purpose of the regular drama, and which constitute the entertainment of the audience. As Crosby Hall was used for the public representation, for profit, of a dramatic piece, it became a place of dramatic entertainment, for the time, within the statutes now in question. The use for the time in question, and not for a former time, is the essential fact."

In the case of *Thorne* v. *St. Clair*, a stage had been erected in a bazaar at Margate, and two persons, dressed in character, appeared on the stage and held dialogues, interspersed with songs and soliloquies. There the magistrates dismissed the case, but the Court of Queen's Bench reversed their decision.

Although in the first case we have mentioned (*Gallini* v. *Laborie*), dancing is stated generally to be a stage entertainment, still it is evident from the context that this is to be understood as applying only to those dances of which a description or copy (to use Lord Kenyon's words) can be previously given; in other words, to those dances only in which actions are represented, as *ballets*, &c. And yet, with the glorious uncertainty of the law, even this would seem to be doubtful, if the recent decision of the "fourteen" in the case of the Alhambra Music Hall is entitled to any weight. There they unanimously decided that a *ballet* is not an entertainment of the stage, although Lord Kenyon had held the contrary opinion, and the Lord Justice Clerk, in *Alexander* v. *Anderson*, had held that no entertainment of the stage whatever, could be exhibited in virtue of the license under the 25 Geo. II, c. 36.

Nay, so anxious were they to arrive at a proper decision, that some of them actually went to the Alhambra, where, like the worthy stipendiary in the case of "Hodge-Podge," they may have dreamt that they were in Germany; and yet, after seeing the stage, proscenium, side-wings, &c., and a mimic battle by the fairies, they thought it had nothing to do with the stage; in the face of the fact that the Lord Chamberlain had interfered with a *ballet*, in the case of the "Halt of the Poor Strollers" in 1854, and he, it is well known, only interferes with stage-plays. As in the olden times, they thought that, being licensed for music, if they only sang a play they were safe, but at last found that they had committed a slight error of judgment (as the manager of the Coburg found, when he sang "Richard the Third,"—*R.* v. *Glossop*, 4 B. & A.); so now, there seems to be an impression that if, under the same license, they only dance stage-plays they are completely protected; and probably they also may discover before the advent of the Millenium that they have been mistaken. Some time since we ventured to hazard an opinion that Pepper's ghost came within the Lord Justice Clerk's definition of an entertainment of the stage in *Alexander* v. *Anderson*, and as such became liable to a penalty, on the principle of the legal maxim, *qui facit per alium facit per se*. When the facetious stipendiary "quenched the light of 'Hodge-Podge'" at the Canterbury Hall, we grew more confident in our belief; and now that the recent decision of the Court of Common Pleas in the case of *Day* v. *Simpson* has put the matter beyond the possibility of doubt, we may safely lay it down that a man must answer for the vagaries of his ghost as well as for those of himself. While Lord Kenyon (after having previously expressed an opinion that tumbling was a stage entertainment) lays it down in *The King* v. *Handy* that tumbling and fencing are not stage entertainments, we have on the other hand, the Lord Justice Clerk (in *Alexander* v. *Anderson*) expressing an opinion that both these may, under certain conditions, become so. And then, passing to the strictly musical, we have Lord Denman

(in *Russell* v. *Smith*) laying it down generally that any entertainment which moves the passions of the audience, or depicts passing events or incidents, is to be considered a dramatic entertainment; and this (by the 3 & 4 Will. IV, and 5 & 6 Vict.) is co-extensive with the word "stage-play." The same authority, too, goes even farther than the Lord Justice Clerk, in not making it essential even to have the aid of characteristic dress or scenery to render the entertainment dramatic. So that in the legal acceptation of the term, a dramatic performance does not depend at all on the number of the performers, or the stage accessories.

From these decisions then, we may collect that no great artistic or mechanical skill is required to form a stage within the meaning of the statute. No platform need be erected, no footlights need fringe the stage with a blaze of light; nor need the services of the scene-painter or the carpenter be called in to set the scene. These are mere superfluities now-a-days. If Punch awakes the echoes in some quiet street, the unconscious pavement has become a stage; if an acrobat does a bit of juggling in the square, his piece of carpet has, as by the stroke of a magician's wand, become a stage; and if two or three street Arabs blacken their faces, and detail the joys and sorrows of Uncle Sam at a public-house door, the little circle of kerbstone takes upon itself the attributes of the stage. In fine, it is the "entertainment," and not the place or its appurtenances, which determines what is or is not a stage.

What then are the ingredients of an entertainment of the stage? "A drama," says Johnson, "is a poem accommodated to action; a poem in which the action is not related, but represented." Bacon calls it an image of actions as if they were present; and Lord Jeffery observes, "a drama is not merely a dialogue, but an action." Aristotle also tells us that "the action and the fable are the end of tragedy," and that both it and comedy "are all entirely imitations" of actions. Action is thus its characteristic feature—action not related, but represented; and this seems to have been the guiding principle

of the courts, in deciding what was or was not within the statutes. And, as was observed by Serjeant Talfourd (no mean authority in these matters) in arguing the case of *Russell* v. *Smith*, "That the whole is expressed in music makes no difference; the early Greek drama was musical throughout; so is the modern Italian opera." So that wherever there is what Aristotle calls the "fable," or a scene or incident, not related, but acted—an image of it given as if it were present—that is to be considered an entertainment of the stage, within the meaning of the statute. A play may consist of mere pantomimic action, or of action combined with dialogue, but the essential requisite is the action —whether it be of a single incident or "scene," or of a combination of incidents, does not signify. Mere narration or story-telling is not a play; but introduce the dramatic element, by acting or representing the same thing as if it were actually occurring before the eye of the spectator, and it becomes an entertainment of the stage. To give an entertainment of the stage, it is not necessary for the actor to utter a syllable; in the ballet there is no dialogue; in the "Dumb Girl of Genoa" the principal character plays her part by the aid of signs and gestures alone; and the case of *Russell* v. *Smith* would seem to indicate that a single individual may compose the whole company, orchestra and all, in his own proper person.

Into the mazes of the controversy about monopoly or free-trade in the drama, we have neither the inclination nor the time to enter at present; but it seems tolerably clear that in the present state of the law the theatrical managers have the weight of authority on their side in the prosecutions they have instituted. Whether or not it is expedient that those minor pieces which are so common now-a-days, should be placed in the same category with the regular and "legitimate" drama may probably admit of question. Still, whether the present agitation should result in a change of the law or not, we are inclined to believe that the interests of the drama would not sustain any detriment from the extension of the trade in

theatres. The love of the drama can never die out, for, as Schlegel observes, it is almost a part of human nature itself, and we suspect that whether its fortunes shall increase or wane must depend more on the public and the public taste, than on any measures which the legislature may, in its wisdom, think fit to devise.

Art. III.—LAW CONSIDERED AS A FORMAL SYSTEM.

(*Intended as introductory to a short view of some applications of the maxim, "Sic utere tuo ut alienum non lædas."*)

I. If law is examined as it exists in fact in any system, it appears to be a rule of action, or rather a collection of such rules. The proximate objects of law are the actions of mankind; and the manner in which law deals with them is by annexing to them the quality of right or wrong, lawful or unlawful; laying down with respect to actions of all kinds, considered as possible or contingent, what are those actions which it is right to do or forbear, and what are those which it is wrong to do or forbear. If, similarly, acts and omissions to act are considered with reference to law, they appear, so far as they are contemplated by law, to be either done in accordance with it, or contrary to it, and are as such described as right or wrong, lawful or unlawful.

Law, therefore, imports limitation, and all things being at large there can be no law, and such things are rather said to be ungoverned or destitute of rule, than permitted. That, therefore, which has been called *jus in omnia*, means only power without law, or action without law, and was only invented to give an apparent legally exchangeable value to the elements which are the objects of law, that is, to base law upon something which is antecedent to law, but yet is itself law, and thus as it were to make it its own reason.

But, law being introduced, that which is permitted by it may as truly be said to be done by law, as that which is enjoined, or the forbearance from that which is forbidden; and that which, law being out of the way, was only a power to act, now becomes a right to act, for right and law are correlative terms, the first only existing by reference to the second.

This then is the sum of what has been said—law is the *norma agendi*—the rule of action. Action is logically antecedent to it, and is the material upon which it operates; nor is action to be considered as created, or the natural power to act given by law, but, contemplating all possible actions, law says of some that they may, of others that they may not, and of others that they shall be done, and by that act of definition creates (as to that law) right and wrong, and (though not natural, yet) legal power of action. And possible actions include all such as are conceived and stated as possible in the system, since though a law may be absurd and impracticable, it cannot for that reason be strictly said to be no law. For whenever an act in general is so permitted, forbidden, or enjoined, as that this permissive, prohibitory, or mandatory proposition may constitute a major premise by which to arrive at a legal conclusion on any particular state of facts, that proposition must be considered as a law.

If it is said that the leaving action free is followed by no legal consequence, it may be replied that this is not true in fact, since it is followed by the consequence of protection in its exercise. And if it is said again by those who insist that law consists only in obligation, that this protection only means that certain other actions are forbidden, which they say agrees with the doctrine that law is distinguished only by prohibition and command—it may be replied that the general formula of prohibition which constitutes this protection is: Forbear from that which may injure another's rights; but where except in law is the definition of rights to be found, and how except by law are they to be ascertained? For it is not a universal prohibition not to injure others in general, but only not to

injure them so far as their interests have been defined and made an object of protection by the law, and law as such does not secure even personal immunity; and a law which permits slavery, though it may be said to be cruel and ungodly, cannot be said to be no law. Further, it does not follow that the prohibition of injury to any particular person or thing necessarily gives to that person a right of property in his own body, or confers on any person a right of property in that thing; so that the ideas are in fact radically distinct, neither of them the consequence of the other, but both, the one as a right, the other as a duty, independent elements of the system in which they exist, and deriving their character as such from law itself.

But it is certainly not according to the usage of language, nor does it agree with the order in which legal ideas arrange themselves, to speak of law as consisting only of obligations, or as containing, or creating without containing, rights, only as a consequence of obligations; for whenever questions of property arise, the first idea that is presented is not that of obligation but of right, and the obligations are clearly for the sake of the right, and not the right for the sake of the obligation; for the commands of law are not for burden but for security. And if it be said that this is inconclusive, because the object of all law is human prosperity, but yet this general object is not part of law, it may be replied that, in the first place, this is not true, however it ought to be true; and, in the second place, if human prosperity in general is the reason of the existence of law, this may show that it is the object of legislation; but, nevertheless, law being established with whatever view, the rights which it creates become the first objects of consideration in determining its obligations; and, in the third place, that if legislation has acted with that view in general, this general object may in some way be considered as part of the law, but in what manner I shall afterwards consider.

But whatever the force of these reasonings may be, it is certain that any scheme which does not consider permissions

constituting rights as being logically as primary and essential a portion of law as commands and prohibitions constituting duties, must give an inadequate conception of law, and will not in its order and relations correspond with facts.

Law, then, being the rule of action, it might be conceived as without any general terms, except these two of right and wrong, and all actions might be referred to the two classes respectively, not by definitions, but by mere enumeration, as in a language which should express every idea by a separate sign, so that any action being apprehended (as all things are originally apprehended) as an aggregate, which is an isolated unit, it might be so included in the class of right or of wrong. But law, in fact, as a system to be understood beforehand, and applied by the subjects of it to events as they arise, can only proceed by general definitions, and such is the law with which we have to do. Hence the distinction in legal decisions between law and fact becomes more complicated, for in determining what is the legal quality of any particular fact, that fact has to be ascertained with reference to those classes of facts to which definite legal rules apply, and so as to bring it within the terms of a legal definition.

Now law defining beforehand actions as right or wrong, the actions themselves to which its rules apply are in their nature contingent, and the event on which any rule comes into operation—that is, the state of circumstances with reference to which its direction as to action is given—is a particular fact to be ascertained from time to time; and though the law may contain rules applicable to some one person or thing, ascertained not by general but by individual description, yet the object matter of such rules would, as to law, be none the less contingent. In other words, law does not predicate the existence of anything, but assumes or supposes its existence, and regulates action upon that hypothesis. The antecedents to action are the agent and the thing with respect to which he acts. The event which forms the limit of any rule of action, is the happening of some state of circumstances, or of some period of time, upon

which the rule is to take effect, or until which it is to operate. These three elements are therefore necessarily contained in any legal rule; namely, the agent, the action directed, and the event or period at which the rule is to apply; for if the rule express no such event, it none the less implies some time, and that is the present time.

Law might thus be considered barely as the directive definition of right and wrong, if it could be conceived as existing among agents whose will and purpose it constituted, or who were incapable of transgressing those limits of action which it prescribes. But since those to whom it is addressed are not only, to some extent, ignorant of its provisions, but have both the will and the power to violate them, actions done in contravention of its rules are included among those possible actions which it contemplates and provides for, and constitute events or contingencies upon which other and supplementary rules of action are limited to take effect.

Now the existence of the facts which constitute the object matter of law, being wholly distinct from and independent of law, considered in its logical form, there can be no principle by which any fact can be excluded from law; for the form of law being a directive rule of action with reference to supposed facts, and limiting action upon them, whatever event is provided for by law, so as to be made the condition upon which any rule of action is to take effect or cease, is by that very circumstance made an element in a legal definition. Law, therefore, may contain provisions, not only for events considered as neither lawful nor unlawful, but merely as events, and for events which are distinguished by the quality of being acts done either according to law or contrary to it, but also for events to which it may annex the character of constituting the commencement or the termination of its own existence as a directive rule, or, in other words, it may limit some event as that on whose occurrence its rules in general shall commence to take effect, or as that on whose occurrence its rules in general shall cease to apply: and as it

may define these events as conditions of its rules, it may similarly define some person or persons as the person or persons having authority to alter its provisions, in whole or in part, either by merely abolishing them, or by substituting new ones in their place, which is making the exercise of their will the event on which such alteration shall take place.

II. This being the formal conception of law as a system, apart from the question of whether it exists in action, that question must be determined by a reference to facts, and these facts appear to be—first, whether the action which it assumes to regulate is in fact regulated by it—that is, whether those whom it names as its subjects act in conformity with its rules; and secondly, whether they do so, not by a fortuitous coincidence, but because it is recognised by them as law, having authority to regulate their actions. For since law, by its form, assumes to direct action, the only fact which will correspond with it is action in conformity with it, and it cannot be said to be effective except when it produces an effect correspondent to its provisions, or when the proposition of fact corresponds with the proposition of law, by stating that as done which the law directs to be done. And since it assumes to direct it by operating on the will of the agent whose actions it assumes to govern, it cannot be said to be effective unless the action directed is done in consequence of its direction. But if law be recognised as having authority to govern, it does not seem necessary to define further how that authority is conferred upon it, for such authority may have many sources, and be founded on many motives, but when that conception is once reached, it becomes itself a distinct and substantive source and motive of action, or is admitted as that which is to supply the test of right and wrong with respect to all actions submitted to it.

In speaking, however, of law as a system practically in action, and capable of forming the subject of distinct analysis as such, it is necessary that its limits as an effective system should be more definitely expressed. And this is a practical and not a formal question, for, on the one hand, every trans-

gression of the law deprives law of the character of perfect operativeness, and the action subject to it of the character of perfect obedience; but yet the law may and does conceive of acts inconsistent with its provisions, as events on which other of its provisions are to apply. On the other hand, however, it would be self-contradictory to assume a state of universal disobedience; but no point, short of universal disobedience, can be fixed on as so inconsistent with its nature that it cannot (as making the law self-contradictory) be included in its provisions But for practical purposes some limit of fact must be found to ascertain the subject matter of such an inquiry, and for the purpose of clearness and certainty it is necessary that the question should be determined by some test which shall be as far as possible obvious and distinct; and that will be some fact which, being of itself easy of ascertainment, will be also one the denial of which will be the most inconsistent with the effective existence of law, and with this object it is necessary to resort to an examination of its purpose.

If, now, an individual obeys, that is, acts in accordance with a rule, following it as such, then, without regard to the source of its authority, that rule may be said to be an operative law. Since, however, the actions of different individuals living in society naturally limit one another, any law which is to regulate the actions of several acting in common, must provide for the cases where they so conflict; and this is, in fact, the substance of social law, and a set of such rules obeyed in common by several persons is entitled to be called a system of social law. But assuming there is not perfect obedience, then those supplementary rules already spoken of, which are limited to take effect on the transgression of some other rule, become of leading importance. For the sake of determining in any particular instance whether any particular thing to be done will be in conformity with, or contrary to law, or whether the prescribed limits of action have been in fact exceeded, and especially for determining the legal consequences of any such transgression, it becomes necessary that some tribunal should

exist with the power *jus dicendi.* Now this tribunal being constituted as the ultimate test of law and the guarantee of its observance, and law being exhibited by it in its most distinct form, disobedience to its decision is practically that disobedience most inconsistent with the effective existence of law; for whilst every trangression of law makes obedience less than perfect, disobedience to an authoritative declaration of law applicable to a particular instance is equivalent to a denial of its authority. But further, supposing a transgression to be due to any cause besides mere ignorance—that is, supposing a will to transgress—the determination of such a tribunal would be useless unless some power existed of compelling action in conformity with it. Here therefore the element of force or compulsion becomes of importance, as a test of whether a law is a practical law with real subjects; and law containing rules, sometimes occupying the first, sometimes the second, and sometimes the third place; or sometimes taking effect on the submission of any legal question to the tribunal; sometimes as an immediate consequence of its decision on the transgression; sometimes only on default in the performance of actions limited as the consequences of the transgression and the decision upon it; and all which rules direct actions that will, by the application of force, constrain the appearance before the tribunal of the parties concerned, compel the subsequent observance in the particular instance of those rules which have been transgressed at the time when they should have been obeyed, or punish the original transgression, or the further disobedience, by the infliction of a penalty; the fact that these rules are obeyed must be the test of whether the law is really operative; or the performance of these actions will be the minimum of obedience consistent with the existence of law as a practical system. If there is no sufficient power with those who are appointed by law as its administrators to use the force necessary to constrain obedience on the part of those who, being nominally its subjects, are minded to transgress it, the law cannot be said to be practically

operative. But obedience is still the ultimate fact; the obedience, namely, of those who, in conformity with law, use force for the purpose of constraining obedience in others. Nor is the test itself one of precision, nor is a precise test in its nature possible; for the existence of this power and its exercise is never absolute or complete, but, like obedience in general, it exists more or less, and is at most only capable of being stated to exist, on the whole or for the most part; but it may practically be said to exist when at any time the legal tribunal has on its side a force greater than any that is opposed to it. It may be said then, that that is an operative system of law which is administered by a tribunal possessing sufficient force to compel the observance of its decisions, and it is operative so far as the power of that tribunal extends.

III. Thus, the logical form of law is a system defining by distinct rules every possible action as right or wrong; but since from the nature both of the actions and the agent this is really impossible, though, by a legal fiction, it has sometimes been supposed to be the fact, it must be considered how that defect is supplied. Now the difficulty arises thus, that acts are composed of a multitude of circumstances, neither is it possible to define with strict accuracy where any particular act ends and its effects begin, nor what are its proximate and what its remote effects; or, as it may perhaps be stated, what is the point at which actions or events due to it as a cause, are yet so far due also to other causes that they cannot with safety be attributed to that alone, or, in other words, where its influence ceases to be the preponderating cause. Law is necessarily affected by this uncertainty and indefiniteness of our knowledge, since, considered as a fixed system, it can only deal with actions reduced to classes by known terms, but, if it may be so personified, is, in fact, forced to see that these classes respectively comprehend actions of very different character, according to the circumstances of the various cases that occur, and perceives that rules laid down with respect to certain classes were never intended to apply nor are properly applicable to cases differing

by the addition or subtraction of some one or more important element or elements from the instances to which they have been hitherto applied, but yet virtually in the same class with those instances. Here, then, the formal rules become insufficient, and recourse must be had to the object for which the rules were constituted. Law, therefore, as to part of its extent, has a fixed and certain form, but as to the larger residue, consists of rules which are continually modified by the operation of certain general principles, which in part may be considered as interpretative maxims of law, but are more strictly maxims of judicial legislation. These maxims, in fact, contain the reason or common sense of law, and it is by consideration of these that the definite rules which form the contents of law were, in part at least, first framed and shaped, and have been since and are still qualified, restrained, or enlarged, when they appear to have contravened or to fall short of the reason which produced them. And after being drawn into many shapes, and forming the foundation of many subordinate principles, which being once established supersede and displace in application and often operate in contradiction to the original reason, that reason still retains its force so as sometimes to prevent the extension of a rule to any case where it is possible to exclude its operation without in effect denying its legal validity in general, and sometimes to give rise to a new rule applicable to new classes of circumstances which are generalised from the change of times and increased knowledge of events and their relations. Thus, many things on which no positive judgment of illegality had been before passed, come in time to be pronounced illegal, others that had been held illegal are allowed, and others remain in a fluctuating condition of doubtful legality; and the remedial laws by degrees adapting themselves to the views formed of the transaction in question vary in their limits, and attach to it more or fewer of the consequences of legality or illegality. And thus also the boundary of law and fact is always and necessarily doubtful and varying, for judges seeking to make the law certain and explicit tend continually

to extend its rules and to bring within its terms new defined classes of facts, and facts continually changing in their circumstances within the limits of their verbal definition are ever tending to falsify the rule. The law defines its terms down to a certain point, beyond that point the definition is what is called the statement of fact, but this point is one which can never be fixed or ascertained until events are stable and uniform in their character, and the language in which they are expressed precise.

IV. The immediate or proximate object matter of law being action, its mediate or ultimate object is the production of some state of things which is conceived as desirable by those whose wishes determine its form. The form of law will, therefore, in each system be determined by the object intended to be secured, but in every system the objects of desire will, from the general similarity of human nature, be for the most part constant, and the differences will chiefly be in the persons for whom the enjoyment is to be secured. In any scheme which is founded on the reason of the public good, the object will be to secure to every one, so far as is possible, the realisation of his desires, and any scheme which has for its object the good of any smaller number will still have the same purpose with reference to that number, and a similar purpose with reference to the rest, so far as that is necessary for the purpose of securing the former. The description, therefore, of the scheme which embraces the good of all, will be the normal statement by means of which any other scheme may be with its appropriate modification described.

In such a general scheme it may be said that the method of reasoning is as follows. All enjoyment depending upon action, the ungoverned action of individuals under the mixed influence of ignorance, selfishness, and passion, tends to defeat and thwart their mutual desires and wishes, and to produce a state of unhappiness. The object proposed, then, being to reverse this result, and to produce, so far as is possible, within the limits of common knowledge the greatest amount of happi-

ness by realising or securing the realisation of the desires and wishes of all, so far as they are consistent with one another, and where they are inconsistent of those which are most for the common good, it becomes necessary to limit the previously ungoverned action, and this is the operation of law. And this general object has been expressed in the terms, "Ea omnia recte fieri, possideri, aut ab aliis postulari, quæ vel ad communem omnium faciunt utilitatem, vel singulorum propriam, nemini nocentem, communique utilitati non repugnantem."

The ultimate object of law, then, being enjoyment, but the immediate object action; enjoyment is known to law only in the terms of action, and all legal propositions are propositions about action; or enjoyment is the substance and reason of law, but action is its form. Therefore the propositions of law are grouped with reference to modes of enjoyment but are expressed in terms of action. Thus the right conferred on any one to an object of property is a right to act with reference to it, and the obligation imposed upon any person, whether with reference to the property of others, or for the sake of any other benefit to be enjoyed by them, is an obligation to do or to abstain from action.

The first step, therefore, is to settle what are those kinds of enjoyment which, as being the most common objects of desire, and the most within our knowledge as to their modes and conditions, it is most desirable and possible to define, secure, and protect, and which are accordingly so defined and protected.

It may be said in the first place, generally, that wherever there exists a state of circumstances or course of action from which any person may derive benefit, there exists a subject matter which is naturally within the scope of legal provisions and a proper object of legal protection: but, secondly, on the other hand, this beneficial enjoyment is recognised only so far as it is connected with some external state of circumstances as its cause, in an immediate and certain, or highly probable way, and not as it may be remotely and contingently attributed to

it. And law is restrained within these limits by a consideration of our ignorance of the relation of causes and effects, and especially of the connection of external facts and internal states of feeling, and the consequent danger of applying its criterion to such matters as do not fall within that class, with which the common sense and apprehension of mankind and daily experience makes us familiar—and hence, whenever the more subtle and the more sensible connections of action and feeling come into competition, the latter preponderates and excludes the consideration of the former.

These modes of enjoyment having been classified, the next thing is that the law should secure them by forbidding the actions of others which may be inconsistent with them, or commanding the actions of others which may be necessary to procure them.

Now it is to be observed that law, as it has been hitherto stated, may consist only of rules directed to the individuals subject to it, as distinct units, constituting their actions right or wrong absolutely; but not as yet creating any legal relation between them, nor therefore any duty from one to another. Such a system, if it further provided means for the enforcement of those rules, and placed the right to exercise those means wholly in the hands of some third person, would be in fact a system of criminal jurisprudence; every right and duty created by it being absolute, and every infraction of its rules being left to be enforced only by and at the discretion of a power distinct from the person in fact injured by it. To create a legal duty from one person to another, it is necessary that the law should confer on the owner of the protected enjoyment a portion of its own authority over the person subject to the duty, or should invest him with a portion of that right of permission, command, and restraint, which it exercises itself, and this is in effect what it does. It substitutes for the absolute rule of action which it might prescribe, a rule in the hands of an individual who has within the limits of that delegated authority the power of determining whether the acts of another

or others shall or shall not be legal, and leaves it to his choice whether he will or will not bind such action by the exercise of that power.

And this authority may exist in two forms; the corresponding right and duty being constituted by general rules of law independently of any existing contract between the parties, or being constituted by and dependent on such a contract, in which case its limits are determined entirely by the terms of the contract, subject to any general rules which may limit the contracting power. But in each case the right conferred is a right of limiting the actions of another, to be exercised so far as it is a mere right at the discretion of the person owning it, and any mode of enjoyment which is coupled with such a right independently of contract is property.

So far as those rights are concerned which are created for the sake of some protected enjoyment independently of contract, the general formula by which the actions of others, interfering with the use and enjoyment by its owner of any object of property, are controlled, is *sic utere tuo ut alienum non lædas*—which may be rendered as a command to every person in the exercise of his natural power of action, not to interfere with the beneficial enjoyment of others; and this maxim, in its application to various states of circumstances, constitutes the rules which regulate the rights of property.

With respect to this maxim, it is to be further observed that although the individual is the subject of legal rules only as an agent, and the rules operate only with reference to acts, yet circumstances derived from a consideration of the nature of the agent may be added to an act in determining its quality as right or wrong; and the acts of man being prompted by motives and intentions which more or less certainly issue in acts which are the objects of law, the presence or absence of a motive or intention may be such a qualifying circumstance. And since the will to obstruct or injure that enjoyment which the law is created to protect, is a fact which tends directly to subvert law, an act coupled with an intention to injure may be quali-

fied as illegal, although the same act without that intention would be innocent. The maxim, therefore, may be rendered as a command to every individual to use care not, in the exercise of his natural power of action, to interfere with the beneficial enjoyment of others.

This general formula includes several different classes of cases in which actual injury may be inflicted on another, which differ also in legal value. For, first, injury may be inflicted with the intention to injure, or it may be inflicted ignorantly and unwittingly. Secondly, the injury may consist in the very act intended to be done, that act being a direct use of or thing done upon an object of property not belonging to the author of the act, and the author of the act intending to use or act upon that particular object of property, but in ignorance of the rights attaching upon it; or, thirdly, it may be the result of an act which in itself, so far as it is intended and abstracted from its unintended consequences, is a lawful act, but which is unlawful by reason of a neglect on the part of its author of this general precept; and such a neglect occurs when he does not, with reference to the circumstances of the case, take care not by his action to interfere with the use and enjoyment of their property by others.

Thus the general prohibition may be disobeyed, first, by wilfully doing injury to another; secondly, by exercising an act of use over the property of another; thirdly, by causing injury to another through acting without the exercise of sufficient care not to do such injury. Thus there remains a fourth class of cases, where injury is done by the act of one to another, but where, nevertheless, the general command is not violated, there being no intention to do the act which is in fact an injury, and no neglect of care in causing it. Of the three classes where it is violated, it may be said that the injuries belonging to the first two are direct, the first containing the intention to injure, the second containing the intention to do the injurious act, though without the intention of injury; the third, being the doing of an act which might be done lawfully,

and which becomes wrongful only by a neglect of care with reference to the circumstances, may be called indirect.

Thus the right of action and enjoyment, and the duty securing it, are not exactly conterminous, for the law giving to the owner of any object of property the absolute right of using it and acting upon it within its limits, and at the same time in general terms prohibiting the action of others which may interfere with that permitted action; there are yet acts which as in fact impeding it, would be under certain circumstances wrongful, but which under certain other circumstances are not so reckoned. Thus, in the application of law, the unimpeded use and enjoyment of any object of property is in some degree curtailed, and on the other hand, the use of it is also in some degree freed from the condition that it must be so exercised as not to affect any object of property differently owned.

Thirdly, it must be ascertained who are the subjects of the rights conferred and duties imposed. For the description of the rights being in general terms, but the application in individual instances, it is necessary to have some means of determining in each instance and at each moment of time, what and how many and how much of these modes of enjoyment is to be secured and protected to each person. This description of the person, whether as a named individual or as a member of a class, or by reference to facts and circumstances ascertaining him otherwise than as a named individual or member, as the person to whom any object of enjoyment is to be secured, constitutes his title to that object, and through this title invests him with a right to it. By a similar process the subject of any duty is also ascertained.

Fourthly, in view of the probability that the prohibitions created for their protection may be disobeyed, the law provides for those whose rights are infringed by such disobedience, a further right limited to arise on that event, for obtaining redress for the injury, or if threatened of preventing its occurrence.

For the present purpose it does not seem necessary to pursue this subject further.

V. To return to the kinds of enjoyment which are to be secured, the state of things to which law is applied must be considered. Now the agent, and the world in which he moves, are known as limited in space; and himself, and all things of appreciable magnitude, are capable of having many actions performed about them, and of performing many actions, and are known not as actions or collections of actions, but as portions of the material world capable of acting or being acted upon. Thus actions are in law for the most part considered in relation to these material magnitudes, or things of a fixed material existence, and are defined with reference to them, being as it were aggregated upon them; so that the legal power of acting in all possible ways with respect to any one of these material magnitudes is considered as one right, and the different modes of acting with respect to any one thing if severed, are still modes of action defined with respect to that thing.

Now, if any person has the right of using or acting upon a given thing, at any time, in all possible ways, in the first place it will follow that no other person can have the right at that time of using or acting at all in reference to the same thing, since all possible actions are already put in the power of the person first mentioned, and this right of excluding the actions of others, following as a consequence on the right of action, has the effect of not only leaving action unopposed but inaction untroubled, which is a bare right of enjoyment, or a right of having; that is, of having *in statu quo*. In the second place, the right being a right to act upon the object, the action so legalised is an action within the material limits of that object, but no right is conferred to act at all beyond its limits so as to affect any other object.

The material existences which are made objects of property may be said to be three; they are—

First: the body or corporeal person of the individual owning it; and, as before noticed, this right of property includes the

right of having it and of using it, or acting with and upon it, but it does not include the right of having or using it in any particular place, for this would imply an additional right of property belonging to a subsequent head. It does not, however, follow, that because the individual is in a place where he is not entitled to be, his right of having and using his own person is therefore extinct or suspended. On the contrary, being wholly distinct from the right of place, and not dependent on it, it is not altered except in certain defined modes; and in these it is qualified with reference to the local rights of others, and the circumstance of his wrongful presence. The right then is capable of full and complete exercise, when the individual is capable of being and acting in such a way as not to infringe any right of property in another; and in order to do this, since his being and action must of necessity happen in some place, it is further in fact necessary to its exercise, that he should be in some place where he lawfully may, and being in such a place, all his action is lawful which affects no object of property differently owned. To this extent, but only to this extent, it is necessary to supplement the right to personal action with a right of another kind.

Besides the body, all material things external to the body, of a defined and ascertainable shape or size, are included among objects of property; and those external material objects are of two kinds, distinguished by the qualities of fixedness and moveability; fixed property consisting of land, and things physically annexed to land, moveable property of all things living or lifeless besides.

Second: therefore are all moveable material objects external to the body, and with respect to any such object, property in it has the same relative contents as property in the body; for such an object has naturally no place, but having a place, its owner may lawfully exercise over it all acts of use and enjoyment, which do not affect any object of property differently owned. And also, as with respect to the person, so with respect to such an object, although not in a place where it may lawfully

be, its owner nevertheless retains the privilege of action and immunity, subject to the definite qualifications above indicated.

Third: land, in fact, constitutes place, being for all ordinary purposes our definition of it; and property in land is considered to include, to a certain extent, property in the space which lies above it; and everything which is fixed to land in a permanent manner is regarded as forming a part of it, having, in fact, the same character of fixedness of place. Land, therefore, and all things fixed to it, form the third class of material existences which are objects of property.

Of these three kinds it may be said, that the first is an object of property physically inseparable from the owner; the second is an object physically distinct from the owner, and not belonging permanently to any defined place; the third is an object also physically distinct from the owner, but occupying permanently the same place.

Besides these three kinds of property, which relate to existing material objects, there are three other kinds which relate to possible action and enjoyment, not defined with reference to any such existing object. Of these—

First: is the exclusive right to perform any particular kind of action; such as to make a particular kind of thing, or to use a particular name or mark.

Second: the right to that enjoyment which consists in the sum of any person's present advantages, so far as it is dependent upon his opinion of facts, and capable of being affected injuriously by a false opinion of them.

Third: that enjoyment which results from the acts of others, considered as dependent on their opinion of him, and capable of being injuriously affected by an error in that opinion.

The rule which provides for the protection of all these modes of enjoyment is as before said the general injunction laid on others—*sic utero tuo ut alienum non lædas*—developed in the three branches already stated. And with respect to them all, this rule condemns as illegal their wilful and direct infringement.

With respect also to all, it may be said in general that the rule makes illegal all acts the doing of which is intended, and which are in fact direct infringements of them, although not so intended; but with this difference between the fifth and sixth, that in the former case the intention must include in it the intention to produce a false opinion, though not necessarily with the intention to injure; in the latter, the intention need only be to produce that opinion which is produced, or which is the natural consequence of the act done; that opinion being false, in fact, though there may be no knowledge that it is false, and, except technically, no intention to injure. And as to these two, the injury may properly be called direct, since it is a consequence which must not only probably but necessarily be anticipated as the consequence of the illegal act. The third form of the violation of this rule cannot take place with respect to the two last modes of enjoyment, if their injury properly belongs to the second branch, neither can it take place with respect to the fourth, since the only injury to that can be the doing an act of the kind which is exclusively permitted to another, which is in terms a direct invasion of that exclusive enjoyment. It is confined therefore to the first three kinds, and with respect to all three it may take place.

It is to be noticed, however, in the first place, with reference to indirect injuries, that the general rule is sometimes developed into particular rules definitely forbidding certain classes of acts, which, though not direct invasions of the limits of any object of property belonging to another, are in their consequences injurious, and that without reference in the particular instance to any inquiry of whether care has or has not been used in doing them; and in the second place, that it is not always easy to define the limits separating direct and indirect injuries; for actions definitely prohibited for the sake of some object of property differently owned, are sometimes of such a nature, that the prohibition appears rather to create a right of property in that object with respect to which they are prohibited, and attached to that object of property for the sake of which they are restrained.

VI. The present purpose is, taking the existence of defined material objects of property as a *datum*, to show the way in which the general maxim of the law, *sic utero tuo ut alienum non lædas*, has been deduced into various formal rules, and has regulated the conduct of those objects, by adjusting the natural conflict of actions performed about them, with reference to the common benefit and mutual convenience; and with that view it is necessary to indicate some of the circumstances which afford the opportunity for the application of the maxim.

Land is distinguished by the fact that it stands in certain peculiar and permanent relations, and also that it is the place of all other objects of property.

In the first place, it naturally stands in permanent and continuous relations with land adjacent to it, which relations are liable to be varied by the mode of its occupation, for it naturally derives certain benefits from, and confers certain benefits upon neighbouring land by the operation of continuous natural causes acting through or over them respectively, and by the action of a neighbouring owner the benefits which adjacent land would naturally receive or afford, may be respectively diminished or increased, or the same causes which would be naturally beneficial may become hurtful, so that the enjoyment of it by its owner may be injuriously affected.

To enumerate these matters more distinctly: in the first place, lands horizontally adjacent mutually depend on each other for support; and of lands vertically adjacent, the upper land is supported by the lower; and this necessity of support may be varied by the manner of occupation, as by placing an additional burden on the supported land or by diminishing its self-supporting power. Secondly, by the operation of natural causes, some lands form the course of streams which pass through various portions of land differently owned, and both increase their fertility and in other respects contribute to their beneficial occupation; and in respect of these (in general) each portion of land so traversed depends on those lands which lie above it on the stream for the continuance of its supply, and on those below it for a discharge of its superfluity.

Thirdly and fourthly, each portion of land is visited by light and air, both of which must arrive at it in some degree over, and the latter of which almost entirely traverses adjoining land, and to that extent depend on its mode of occupation, and these also confer benefits on the occupation of the land. All these, which are benefits coming to the land from without, are capable of being injuriously affected by the action of the adjoining owner acting within the limits of his own land, and committing no act of invasion upon, nor exercising any use over the land to which they naturally accrue.

Here, therefore, it is necessary for the law to say what and how much of this enjoyment by the landowner shall be secured, and what shall be the extent of the corresponding restriction laid upon the action of his neighbouring owner; and also what modifications of the *prima facie* right may be created by usage or contract, and what analogous rights may be constituted.

In other respects also, the beneficial occupation of land may be injuriously affected by the acts of a neighbouring owner done on his own property, and which are not connected with the continuous causes above mentioned, but have a peculiar operation on the occupation of the adjacent land, only by virtue of its proximity in space, and here also there arises a conflict of interest between the one who cannot so beneficially occupy his land without doing those acts, and the other who cannot so beneficially occupy his land in consequence of them; and the limits of their respective rights have to be adjusted by law.

Secondly, land is distinguished as the place of all other objects of property, and in this character it forms a material and leading element in determining whether in case of an injury happening to an individual either in person or some external object of property through the act of another, the author of the act is liable to make compensation for the injury inflicted. In the case of injuries of this kind, formal rules almost entirely disappear, and the whole question is commonly resolved into a question of the fact whether care has or has

not been exercised by the person who was the author of the injury, or by the person who has suffered it; but inasmuch as the degree of care which may be required in any case depends on the probability of the event occurring which has occurred, there is scarcely any circumstance which has so much weight as the fact whether either party did what he did in a place where he was *primâ facie* entitled to do it; since this fact forms to a great extent the measure of the probability which he was bound to take into consideration.

Art. IV.—A DIGEST OF MOOHUMMUDAN LAW.

A Digest of Moohummudan Law; on the Subjects to which it is usually applied by British Courts of Justice in India; compiled and translated from Authorities in the original Arabic, with an Introduction and Explanatory Notes: By Neil B. E. Baillie, Member of the Royal Asiatic Society, Assistant Secretary to the Indian Law Commission, and formerly Government Pleader in the Court of Sudder Dewanny Adawlut, and an Attorney of the Supreme Court of Judicature at Fort William in Bengal. London: Smith, Elder, and Co., 65 Cornhill. 1865.

SUCH is the title of what we do not hesitate to pronounce to be the ablest compilation on the subject of Moohummudan Jurisprudence ever yet given to the world. It comes from the pen of an author in every way qualified by his talent and antecedents to throw light upon the subject which he seeks to illustrate. Since the publication of the great work of Sir William Macnaghten, on the "Principles and Precedents of Moohummudan Law," which has hitherto been the text book of those who have had to administer, in suits between Moohummudans, the Law of their Prophet, we are not aware of any work so exhaustive, and so able as the

present—a work in which the writer has combined with abstract utility and value as a legal treatise, the charming quality of a most readable book, instructive and amusing to the general reader, as well as to the profession.

The importance of the branch of law discussed in this volume, may be gathered from the fact that by Act of Parliament, the Moohummudan law is applicable, in the Presidency towns in India, to all suits between Moohummudans, which relate to their succession and inheritance, or to matters of contract or dealing between them; and in the Moofussil, or country separated from, or without the Presidency towns, it is applicable, under regulations of the local governments, to all suits between Moohummudans, regarding succession, inheritance, marriage, caste, and all religious usages and institutions. The "Coke" of Moohummudan law, or at least the principal exponent of the legal teaching of the Prophet and the Koran, was Aboo Huneefa; and the law exhibited in this volume is agreeable to the doctrines of the Hanifeea sect. Aboo Huneefa had two disciples, Aboo Yoosuf (or Joseph), and Moohummud (Mahomet), who attained to great eminence as expounders of his doctrines; and, says Mr. Neil Baillie (Preface, p. VII.)—

"The Hanifeea is the first, and by far the most numerous of the four Soonnee or orthodox schools of Moohummudan lawyers. Its doctrines are law in the Turkish empire, and generally throughout the Mussulman countries of Asia, with the exception of Persia, where the *Shia* (or Sheeya), is the prevailing sect."

The Moohummudan sovereigns of India (the last of whom —the Great Mogul and King of Delhi—died the other day in Rangoon, a captive for his misdeeds, and a prisoner in custody of British troops), were all Soonnees of the Hanifeea sect, and their tenets were the *lex non scripta* of the country, while it remained subject to its native rulers.

"There are," says Mr. Baillie, "now, and probably long have been, a good many Shias (Sheeyas) in India; and to professing

Shias the Imammeeya code has been administered by British Courts of Justice in matters of inheritance. It probably would, in like manner, be administered to them on the other subjects to which the Moohummudan Law is usually applied, if questions on these matters should arise between Shias, and be brought for decision before the public tribunals. The Nuwab Viziers of Oude were of the Shia persuasion, yet, so long as they preserved a nominal allegiance to the Sovereign of Delhi, the Hanifeea code remained the law of the province. Since the assumption of regal dignity by Ghazi-ood-deen Hyder, the Hanifeea has been gradually superseded by the Imameea code, which is now administered by the British Commissioners in Oude to Mussulmans of the province as the customary law of the place." (pp. vii. and viii.)

Mr. Neil Baillie's work is, he states, founded chiefly on the great Digest of Moohummudan Law, prepared by command of the Emperor Aurungzebe Alumgeer, and known as the "Futawa Alumgeeree. This Digest, with the Hidayah and the two commentaries thereon, the "Kifayah" and "Inayah," make up the grand basis of Moohummudan jurisprudence, on which the present work is a commentary. We propose, in the present article, to give a brief outline of a system of law, Oriental and quasi-Mosaic in its character, which must be deeply interesting at a time when India is attracting so many of our fellow countrymen, both to the public service there, as well as to independent professional life.

The first of the twelve books into which Mr. Neil Baillie's Digest is divided, treats of the law of marriage; and an early chapter in the first book is devoted to the subject of "Women with whom marriage is unlawful or prohibited." Our lay readers, if their names appear in any London or local directory, have doubtless received from the Secretary of the London Association for Legalizing Marriage with a Deceased Wife's Sister, circulars, urgent appeals for aid, and solicitations for signatures to petitions. The measure has repeatedly passed the Lower House, and has always been rejected in the Lords, mainly if not entirely by the force of Episcopal opposition;

and it will be most interesting to them, as well as to the profession, to learn from Mr. Baillie what the provisions of the Moohummudan law are on this subject—provisions framed, as were the Mosaic ones, by an Oriental mind, by an intellect cast in a similar mould with that of the framer of the Pentateuch, and with physical and national sympathies possessing on many points a striking resemblance.

And agreeably with this view of similarity, it is not surprising to find that the words of the book of Leviticus, "Neither shalt thou take a wife to her sister, to vex her, to uncover her nakedness, beside the other in her lifetime," are almost exactly echoed by the words of the Digest:

"It is not lawful to cohabit with two sisters, either in marriage or by right of property, whether they be sisters by consanguinity or fosterage." (Dig. page 31.) "If a man marry two sisters by one contract, he must be separated from them both." (Same page.) "As it is not lawful for a man to be married to two sisters at the same time, so also it is unlawful for him to keep them both for pleasure; and when a man is the owner of two sisters, he may enjoy whichever of them he pleases, but when he has enjoyed one of them, he is not at liberty to enjoy the other; and in like manner, if he should buy a female slave and have connexion with her, and then purchase her sister, he may repeat his intercourse with the first, but cannot have connexion with the other until he has made the first unlawful to him, which is done either by marrying her to another man, or by parting with his right of property in her." (Page 33.)

In all this we see the echo of the Levitical "in her lifetime," and not a word of the casuist gloss, which (to use Moohummudan phraseology) makes his wife's sister "prohibited" to a man, after the first wife had been permanently separated from him by death. Indeed, it does seem difficult to understand how any one, reading the Levitical words with the eye of common sense, can resist the conclusion, that the basis of the Mosaic prohibition is no imaginary affinity or consanguinity, but a wise provision to obviate "vexation," and prevent family bickerings, for which manifestly there is no

place after the deceased wife and sister is laid in her grave. The analogy is clearly in favour of the marriage law reformers' views, and we make them a present of the argument, *quantum valeat.*

In respect of prohibition induced by affinity, the Moohummudan law goes into requirements which will probably surprise those who have been accustomed to think of Asiatics as little better than savages. Here is a specimen of casuistical dogmatism which almost reminds one of the theological precepts of Peter Dens:—

"If a man should touch with his hand the hair of a woman's head at its junction with the head, prohibition would be established without doubt, and, according to Natikee, without this distinction and absolutely. If he should touch her nail with desire, prohibition is established. It is assumed that there are no clothes between the parties, and if there be a cloth between them, so thick that the person touching cannot feel the warmth of the other's body, prohibition by affinity is not established, however much desire may be excited; but if the cloth be so fine that the warmth of her body can be felt by his hand, it is established. So also if his hand were applied to the sole of her boot, unless it be so hard as to prevent his feeling the softness of her foot. And, when a man kisses a woman with a cloth between them, but is sensible of the cold of her front teeth or of her lip, that is a kiss, and the case is the same with regard to touch. A prolongation of the touch is not necessary; hence it has been said that if a man should reach his hand to a woman, with desire, and it should happen to touch the nose of her daughter, and his desire were increased, the mother would become unlawful to him, though he had withdrawn his hand on the instant. But it is a condition that the female touched be old enough to have desire; and the 'futwa,' (a Moohummudan phrase corresponding to the Responsa Prudentum of the Roman Law), is in favour of nine years as the age of desire, and nothing under it." (Book I., chap. iii., p. 26.)

In respect of the contract of marriage, and the formalities necessary to its validity, our Moohummudan fellow-subjects in India appear to be very much in the same position as our

Caledonian friends north of the Tweed. No legal necessity appears to exist for the accessories—so familiar to the English mind—a clergyman or priest, and a troop of attendant bridesmaids. The efficacy of the marriage contract appears rather to depend on the use of certain *verba de præsenti*, a certain formal interchange of troth between the intending spouses, couched in words to which the Moohummudan law has attached precisional force.

"Marriage is contracted by declaration and acceptance, when both are expressed in words of the past, or when one of them is expressed in the past and the other in the imperative or the present. So that when a man has said to a woman, 'I marry thee for this,' and she has said, 'I have accepted,' the contract is complete, even though he should not reply, 'I have accepted.' And if he should say, 'marry thyself to me,' and she should accept, the contract is effected, provided that *he did not intend a future time* by the expression. (Book I., chap. ii., p. 14.)

Indeed, it would seem that not only in respect of matrimony, but, as we shall presently see, in respect of divorce also, lovers once married, are, by Moohummudan law, required to be singularly cautious in the use of their tongues. As in Scotland, a man may really find himself married before he knows where he is, as the saying is; and the free and easy system (if we may so call it) of the Beamish and Yelverton cases, is fully equalled by the matrimonial regulations of the Hidayah and Kifayah.

"If a man should say to a woman, 'I have bought thee for so much,' and she should make answer by 'Yes;' and, if a man should say to a woman 'Thou art mine, or hast become mine,' and she should answer, 'Yes;' so also if he should say: 'Be my wife for a hundred, or, 'I have given you a hundred that you may be my wife,' and she should accept, it is a marriage." (Book 1, ch. 2, p. 15).

Fortunate, indeed, it must be for young Moohummudan lotharios, that the use of the generous grape, in its vinous and alcoholic form, as well as the pale ale of Britain, are prohibited to him by the regulations of the Koran; otherwise, any youth

might find that in a moment of excitement, stimulated by draughts of Allsopp, or Duff Gordon's sherries, he had irrevocably, and almost unconsciously, entered into the holy estate.

There is, however, fortunately for such youths, some limit to this free and easy system.

"Afee-as-Soghdee, having been asked concerning a man who saluted a woman, saying, 'Salaam uleki (peace be to thee) O, my wife,' whereupon she answered, and to the salaam, "O, my husband," (the words being heard by witnesses), said that there was no marriage. And when a person says to the father of a girl, 'Hast thou married thy daughter to me?' And he answers, 'I have married,' or, 'Yes;' there is no marriage until the man say after this, 'I have accepted;' for, his first words, 'Hast thou married to me?' are merely interrogation." (p. 17.)

We must, however, hasten away from the interesting subject of marriage, to the many other important topics embraced in Mr. Neil Baillie's Digest. Before doing so, however, we must ask room for one extract, showing how the Moohummudan law deals with matters which medical inspection of the female person determines in England."

"If the signs of virginity be lost by jumping, or during the courses, or by a wound, or by long abstinence from marriage! the woman is still to be accounted a virgin; and so, also, according to Aboo Huneefa, if they be lost by illicit intercourse!! But both the disciples were of opinion that in such case, silence would not be a sufficient evidence of consent. . . . . A virgin, whose husband has died after retirement with her, but before actual consummation, is still to be treated as a virgin, when she enters into another marriage. . . . . But if a woman lose her virginity by an invalid marriage, or by being compressed by mistake! She marries subsequently as a thuy-yi-bah (virgin). (p. 61.)

But we must pass on, though every page of the one hundred and ninety devoted to the subject of marriage teems with interest. Book II. is devoted to the law of Fosterage, which is

shortly disposed of in about a dozen pages. The pervading idea seems to be, that imbibition of the foster-mother's milk so thoroughly affects the system of the fostered child, as to create in it a blood relationship with the natural children of the fosteress' womb, as to create consanguinity. In dramas founded on stories of Irish life, we have, we think, observed that the foster brother and sister are (to use a common expression) much more kin to each other than we cold English should expect to result from their foster relationship; but we do not think that even Irish warmth of heart ever carried the doctrine so far, as to say with the Moohummudan jurists, "If milk should appear in the breast of an unmarried virgin, and she should suckle an infant, she would be its mother by fosterage, and the rules of fosterage would be established between them." (Page 196.)

The Third Book is devoted to the subject of divorce, of which there are thirteen different kinds; seven requiring a judicial decree, and six that we we may call automatous "separations, under the option of emancipation, or for *Eela*, apostacy, difference of *dar*, or by reason of property (that is, one of the parties being the owner of the other), or a marriage being invalid." (Page 203.) The same feature which we noticed in respect of the Moohummudan law of marriage, namely, the effectiveness of the mere use of certain formal words by the parties, without sacerdotal intervention, is equally striking and prominent in their law of divorce. To use the exact words of Mr. Neil Baillie (p. 205), "Its *pillar* is the expression, THOU ART REPUDIATED." The simple use of these words, with certain unimportant modifications and variations, appears to effect, and that immediately, what it takes with us a lengthy suit for judicial separation.

"Repudiation," says our author, page 208, "by any husband who is sane and adult is effective, whether he be free or a slave, willing, or acting under compulsion; and even though it were uttered *in sport or jest*, or BY A MERE SLIP OF THE TONGUE INSTEAD OF AN-

OTHER WORD ! ! !" Again, "When a man says to his wife, 'Thou art repudiated,' *without knowing the meaning of the words, or so much as what is implied by repudiation,* still the words are effective, and the woman is repudiated judicially, though in a religious point of view there is no repudiation."

Mr. Neil Baillie explains, in the introductory section to the book on divorce, that the Moohummudan law clearly recognises, precisely in the same manner as our own courts, the distinction between judicial separation, *a mensa et toro,* and dissolution of marriage, *a vinculo matrimonii.*

"There are thus," he says, "two senses in which the term TULAK is used in Moohummudan law, yet one of which comprehends the other. In the more comprehensive sense it is the title of a *Ketab,* or book which comprises all the separations of a wife from her husband for causes originating in him; in the less comprehensive sense it is restricted to that kind of separation or release from the marriage tie which is effected by the use of certain appropriate words by the husband."

It is, we think, not quite clear, whether the triple repudiation, or use of the specific and appropriate formulary three times, is an absolute bar to all further conjugal intercourse and connexion, so that the parties are entirely released from each other and free to marry again; but it is distinctly laid down by Mr. Neil Baillie (p. 226), that one single repudiation of an unenjoyed wife is irrevocable. It seems, also, that there may be temporary repudiation, conditional repudiation, local repudiation, or repudiation while the parties occupy or dwell at a place; and delegated repudiation, where a husband commits to a third party, or even to his wife herself, his power to use the words of repudiation. The following are special instances given by our author (p. 269), which we quote, as showing most forcibly the peculiar form of thought and action which so distinguishes Asiatic from European ideas:—

"A man says to his wife, 'If this night you do not come near me, then you are repudiated,' and she comes to his door but does not

enter, repudiation takes effect; but if she should enter his apartment while he is asleep, she would not be repudiated, and the condition of coming to him would be satisfied by her coming within reach of his arm. A woman being asleep on her couch, her husband calls her to his, and on her refusing, he says, 'If you do not come this night to my bed you are repudiated;' after which he himself brings her forcibly to his bed in such a manner that her feet do not touch the ground, and she sleeps with him for the night, repudiation does not take effect."

The following is as neat a *dodge* for evading a conditional repudiation as can well be conceived.

"A woman takes a *dirhem* (a small coin) from her husband's purse, and buys meat with it, and the butcher mixes the *dirhem* with other *dirhems* of his own; but the husband having said to his wife, 'If you don't return that *dirhem* to me to-day you are repudiated three times,' and the whole day passes without the *dirhem* being returned, repudiation takes effect. The proper device in this case would have been for the woman to take the butcher's purse and deliver it to her husband, which would have satisfied his oath."

Suits by the wife against the husband, for dissolution of marriage on the ground of impotency, are disposed of by Moohummudan law with great deliberation and caution. When a woman brings her husband before the judge, and sues him, demanding a separation on the ground of impotency, the judge is to ask him if he has had intercourse with her or not; and if he should admit that he has not had intercourse with her, the case is to be adjourned for a year, whether the wife be an enjoyed woman or a virgin. If the husband should deny the charge, alleging that he has had intercourse with her and she is an enjoyed woman, his word is to be taken, accompanied by his oath that he has had intercourse with her; and if he should swear to that effect her right is void; but if he refuse to swear, the case is to be adjourned for a year. If she shall allege that she is still a virgin an inspection by women is to

be ordered; for though one woman is sufficient, yet an inspection by two is more cautious and more to be relied on. If they should declare her to be an enjoyed woman, the word of the husband is to be taken with his oath; and if he should swear, her right is void; while if he refuse the case is to be adjourned for a year. If they should declare her to be a virgin her word as to non-intercourse is to be received without oath. When the fact is ascertained that there has not been any intercourse between the parties the judge is to adjourn the case for a year whether the man refuse it or not, (pp. 345, 346.] During these several periods of a year, provision is made by the law for deductions of such spaces of time as may be occasioned by sickness or imprisonment, and the like, which spaces of time are not to be reckoned in computing the years.

Our observations and quotations from the Book on Divorce have been lengthier than was intended; and interesting as the rest of this section is we are unwillingly compelled to hasten on to the fourth book, which treats of Slavery. We need scarcely say that by pure Moohummudan law a slave is a saleable chattel, with incapacity to be a legal witness, or to inherit, "a bequest to a slave being a bequest to his owner." With female slaves a master has the old feudal right *milk-i-moolut*, or right of enjoyment, with the qualifying improvement that his children by them have the same rights and privileges as his children by his wives. Here at least Moohummudanism is a step in advance of Lousiania, an advance which is further protected by the authorative declaration (page 380,) that when a man has seduced his female slave, and has had intercourse with her without "IZL," and she is subsequently delivered of a child, he ought to acknowledge it, and AS BETWEEN HIMSELF AND HIS CONSCIENCE IT IS NOT LAWFUL FOR HIM TO SELL THE MOTHER. With these details, however, the British barrister or judge in India need not now, thanks be to God, trouble himself, except as matter of speculation, for by an Act of the Indian Legislature (No. V.

of 1843), so short and important that we quote it in full, Moohummudan slavery is virtually and practically extinct wherever the cross of St. George waves. The Act is as follows:—

I. "It is hereby declared and enacted, that no public officer shall, in execution of any decree or order of Court, or for the enforcement of any demand of rent or revenue, sell, or cause to be sold, any person, or the right to the compulsory labour or services of any person, on the ground that such person is in a state of slavery.

II. "And it is hereby declared and enacted that no rights arising out of an alledged property in the person and services of another as a slave shall be enforced by any Civil or Criminal Court, or magistrate, within the territories of the East India Company. (Now read Queen).

III. "And it is hereby declared and enacted, that no person who may have acquired property by his own industry, or by the exercise of any art, calling, or profession, or by inheritance, gift, assessment, or bequest, shall be dispossessed of such property, or prevented from taking possession thereof, on the ground that such person, or that the person from whom the property may have been derived, was a slave.

IV. "And it is hereby enacted, that any act which would be a penal offence if done to a free man, should (qu. *shall*) be equally an offence if done to any person on the pretext of his being in a condition of slavery."

Our remarks on the remaining portions of Mr. Neil Baillie's work must necessarily be brief. The fifth book treats of "Parentage," the law of paternity and maternity, and of "Hizanut" or the custody of young children; and the only observation which it occurs to us to make is, that it would seem that the Moohummudan jurists consider six months the shortest period of gestation in the human female, and accept the legitimacy of all children born, provided six months have elapsed after legal copula. They also consider that a mother has the best right to the custody of her infant child, next the

grandmother, then sisters and their daughters, and then aunts; but all such are disqualified by marriage with strangers.

With this chapter concludes the first portion of the Digest—which may be briefly termed the Law of Domestic Relationship. The seventh to the eleventh books treat, with great elaborateness, on the Law of Pre-emption, Gift, Appropriation, Wills, and Inheritance. It would be impossible in the limits of a review to do more than cursorily glance at a few prominent and distinctive features in these portions of Mr. Neil Baillie's valuable work. In respect to the Right of Pre-emption, the following extract will be found interesting:—

"Within a mansion, which is situate in a street without a thoroughfare, and which has several owners, there is a house belonging to two persons, and one of them sells his share in it. The right of pre-emption belongs first to the partner in the house, then to the partners in the mansion, and next to the people in the street, who are all alike. If all these give up their right, it belongs to the MOOLASIK, or contiguous neighbour, by whom is meant the neighbour behind the mansion who has a door opening into another street." (Page 478.)

We presume, therefore, that a "back to back" neighbour has a priority of emption over the general public.

Here is a paragraph for our friends who uphold the *Flat*-system north of the Tweed:—

"If a person have the upper floor of a mansion, with a way to it through the mansion, the rest of the mansion being the property of another person, and the owner of the upper floor sells it with its right of way, the right of pre-emption belongs, on a favourable construction, to the owner of the lower floor; but if the way to the upper floor be through the mansion of a third party, the owner of the mansion in which the way lies has a preferable right to the pre-emption of the upper floor. A mansion belongs to two persons, one of whom has also a right in a party wall between it and another mansion belonging to him and a third party, the partner in the first mansion, who is also part-owner of the wall, sells his share in the mansion and the wall; the partner in the mansion has the better

right to the pre-emption of it, and the partner in the wall the better right to the pre-emption of it." (Pp. 479, 480.)

We are very unwillingly compelled to pass over without remark and quotation the interesting chapters on Gift and Appropriation. In respect to bequests for pious and charitable purposes, our Moohummudan fellow-subjects appear to have a special statute of mortmain of their own, which prohibits them leaving to the holy shrine (p. 624) more than one-third of their property.

"If a person should bequeath a third of his property to the Holy Shrine, the bequest is lawful, and the third should be expended upon its buildings, lamps, and the like . . . . . And, when a bequest is made 'to fight in the way of God' on the part of the testator, maintenance is to be given to a *ghazee*, or religious warrior, for his sustenance in going and returning, and remaining with an expedition; but no part of it is to be expended on his family; and if there is any surplus it must be restored to his heirs." (p. 624.)

And here is liberality—

"It is lawful for a Mooslim (the old-fashioned Moslem) to make a bequest to poor Christians, for that is no sin,—in opposition to building a church for them, which is sinful,—and he who assists in building churches for them is a sinner."

A parallel, not altogether unfavourable to Moohummudanism, might well be drawn between these liberal views of Moohummudan jurists, and the papal restrictions on the services of our Church within the precincts of the Holy City of Rome. We are afraid the scandal of "no church of England" in Rome, but only prayers at the Ambassador's, still continues.

The eleventh book, on Inheritance, contains a vast amount of interesting and illustrative information. The provisions of Moohummudan Law on the legal capacity to inherit, appear to be more complicated than those of our own law. A child inherits if born alive, but if born dead he does not inherit. The signs of life are breathing, making a sound, sneezing,

weeping, and action, as of the eyes or hands. If half of the child is protruded alive, and it then dies, it is entitled to inherit, but not if less than half is protruded. And, mark the discrimination with which the rule of the necessary half protrusion is regulated:—

"When the head is presented, and the breast is protruded while the child is still living, it inherits; but if the feet are presented, regard is to be had to the navel." (p. 703.) "If violence has been done to the mother, as, for instance, if she has been struck on the belly, and has cast her progeny, such progeny is to be regarded as one of her heirs; for the law imposes a liability on the striker, and liability is incurred only for an offence against the living, not against the dead. When, therefore, we presume the child to have been alive, he is entitled to his share in the inheritance, and the share can be inherited from him in the same way as the exchange for his life (apparently a Moohummudan deodand) is inherited from him, and that is the fine." (p. *ibid.*)

One more interesting extract only, from this eleventh book, we must give, as denoting the difference between the turn of European and Asiatic thought on the doctrine of Presumptive Survivorship. The Moohummudan jurisprudents do not appear to take into consideration the age and robustness of the deceased, as elements tending to a correct decision on the probabilities of the instant of death:—

"Where several persons have been drowned or burnt together, and it is not known which of them died first, we treat them all as having died together. The property of each will accordingly go to his own heirs, and none of them can be heir to another, unless it is known in what order they died; when those who died last will inherit to those who died before them. And the rule is the same when several are killed together by the falling of a wall, or in the field of battle, and it is not known which of them died first." (p. 704.)

The remaining, or twelfth and last book of Mr. Neil Baillies Digest, is a kind of code of civil procedure; parts of which

remind us very forcibly of the black horses, white horses, and pyed horses of Scriblerus' Reports, quoted by Mr. Warren, in his "Introduction to Law Studies." The supplementary oath of the party himself in a civil suit, reminds one of the *Semi plena probatio* of the Roman law; for, (p. 934) if a defendant refuse to swear—that the claim is not valid—the judge is to decree against him on the ground of his refusal; and it would seem (p. 738) that the *denyer* of a claim only is by Moohummudan law to be sworn; and his oath is preferred to that of the claimant, provided the latter has no corroborative testimony at his command.

With these remarks we conclude our brief review of Mr. Neil Baillie's most able and interesting book. Dry as the study of the law is generally believed by outsiders to be, we think we may safely assure all thoughtful and careful readers, that in Mr. Neil Baillie's work, they will find a large store of deeply interesting and valuable information, and a great amount of illustrative ethnical science, well worthy the attention of those who, either as legislators, politicians, or judicial officers, have to deal with the legal rights, and responsibilities of our Moohummudan fellow-subjects in India and elsewhere.

Some little defects of style there doubtless are in Mr. Baillie's phraseology, as well as an occasional want of precision in expression, but these are not sufficient to detract from the abstract value of the entire work. It must become a *vade mecum* for Indian officials having to administer Moohummudan law, and will doubtless form hereafter part of the academic curriculum prescribed for the competition *wallahs*, whom the country sends forth, in such promiscuous swarms, twice a year to India. Whether these young men will ever hold, in native estimation, the same high character, rank and *caste*, which the Civil Service held, is a question which time has yet to solve; but of this we may be certain, that an attentive study of Mr. Neil Baillie's book, and others of a similar character, during the outward voyage, would place our

competition wallahs in a far better position as qualified legal administrators, than the whist, flirtation, and other questionable amusements to which the embryo civil servant's first six weeks after leaving home are ordinarily devoted.

Art. V.—LORD WESTBURY AND THE RECENT SCANDALS.

Report from the Select Committee of the House of Lords, appointed to inquire into all the circumstances connected with the Resignation by Mr. Edmunds of the offices of Clerk of the Patents, and Clerk of the Commissioners of Patents, and with the resignation of the office of Reading Clerk, and Clerk of the Out-door Committees in this House, and also into all the circumstances connected with the grant of a retiring pension to him by this House, and to report the House; with the proceedings of the Committee, Minutes of Evidence, and Appendix. Session 1865.

Report from the Select Committee on Leeds Bankruptcy Court, together with the proceedings of the Committee, Minutes of Evidence, and Appendix. Ordered by the House of Commons to be printed. June 22, 1865.

IT is with no very agreeable feelings that we proceed to perform a task, which, if we had been free to follow our own inclinations, we should willingly have avoided. But two such investigations as those which have recently taken place, the main issue in each involving serious charges against the head of the law for the time being, and various other persons connected with the profession being implicated; and these investigations having been followed by a vote of the House of Commons of want of confidence in Lord Westbury as Lord Chancellor, and the resignation by his lordship of the Great Seal, could not with propriety be passed over by us in silence. We know how much the disclosures which have

been made have agitated the profession, and how strong a feeling of disgust has been excited by them. Notwithstanding, therefore, any reluctance which we may experience in dealing with such matters at all, we undertake the duty before us with the utmost confidence that in expressing our candid and impartial opinion on these unfortunate transactions, and in judging the different parties connected with them with righteous judgment, we shall not be considered as doing more than we were bound to do.

With regard to Lord Westbury himself, we need scarcely say that there is nothing in the feelings of the profession towards him, which can in the slightest degree operate in preventing us expressing our views with respect to his conduct in the most unreserved and decided manner. No man ever ascended the woolsack with less sympathy on the part of the Bar. Of course his ability was universally acknowledged, and we are not aware that he was ever charged with having done anything in his practice which was contrary to the strictest rules of etiquette. But his manner and bearing towards the rest of the Bar had rendered him, to say the least, unpopular, and amongst all the men with whom he daily came in contact, we doubt whether he had a single friend. The profession accordingly, despite his great talent, never felt the same interest in him which it usually does in its more eminent leaders. His elevation to the woolsack, therefore, although fully acquiesced in, was not an event that called forth any very warm feelings of approval and congratulation from the Bar.

There was nothing, however, in Lord Westbury's conduct when at the Bar to lead anyone to suppose that his exercise of patronage as Lord Chancellor would not be directed by the highest and most honourable motives. On the contrary, his apparent assumption of moral, no less than of intellectual superiority to other men, seemed rather to imply that it would be impossible to find, even at the Bar of England, ability and integrity sufficient to fulfil the requirements of his lofty and

severe standard. It is not, therefore, in the slightest degree for the purpose of suggesting the probability of Lord Westbury's being guilty of what he has been charged with, that we have alluded to the feelings of the Bar towards him, but only to show that in dealing with the charges against him we are not likely to be led away by any sentimental bias in favour of his lordship, and that wherever we take a lenient view of his conduct we have only a regard for what is just and right. On the other hand, we shall be especially careful, wherever we shall find it necessary to condemn his lordship, to guard against the admission of any feeling which might at all influence us unfavourably in judging of his conduct. We have no hesitation in saying, that if anything will be likely to lead us astray, it will rather be a desire to do ample justice to an unpopular man who has received a heavy blow, and for whose ability and services we have the highest admiration, than any feeling of dislike towards one who has never enjoyed the esteem of the profession.

It was naturally supposed at the Bar, when Lord Westbury first received the Great Seal, that judging from his previous demeanour, it would be in vain for any man to think of approaching him as a candidate for any office, unless he could show the very highest claims. Various appointments, however, made by his lordship, which did not prove very conspicuously the wonderful powers of discrimination which he was supposed to possess, somewhat rudely shook this notion. And when Bethell after Bethell was appointed to important offices, or transferred from one office to another, it became obvious that the Chancellor was only as other men. During all this time, however, his lordship showed great zeal for the purity of the administration of justice in the courts under his control. Commissions were sent to examine into the state of the different Bankruptcy Courts, and all irregular registrars and defaulting official assignees were treated with rigid severity. In some cases the vacancies were well filled up, in others there were suspicions that all was not right. It was some satisfaction when Mr.

Richard Bethell was obliged to resign an office to which he ought never to have been appointed, and when it seemed probable that he was not likely to afford any trouble, except to his creditors and his own family, for the future.

Hitherto, there had only been a great deal of talk about some of the appointments of the Lord Chancellor, but the moment the Edmunds scandal got wind, a more serious aspect of affairs arose. There was some excuse for what had been done before—all that had been done had not been known—and the chief feeling in the public mind was, that Lord Westbury had not altogether exercised his patronage in a manner consistent with his lofty professions of purity. It was obvious to everyone that he had committed some great mistakes; we do not think it necessary to use a worse name. He had erred greatly in appointing too many of his own relatives to important offices. We have seen a list of the appointments made by Lord Westbury of this nature, and a most formidable list it is. Now we would not be supposed for a moment to maintain that a Lord Chancellor, or any other judge, ought to pass over the members of his own family, provided they are sufficiently qualified, when vacancies in offices under his patronage occur. But it is quite clear that the bestowal of such offices on a man's own relatives may be overdone. There is a limit which common sense and common decency dictate, which is sometimes overpassed, and which we certainly think was overpassed by Lord Westbury. It was this, we feel assured, which brought upon him all the obloquy which he incurred in consequence of the Edmunds scandal.

But the most serious mistake which up to this time Lord Westbury had committed, was in ever appointing Mr. Richard Bethell to any public office of trust at all. The previous career of that individual had been so notorious that it ought to have perpetually excluded him from any such appointment; and if he wished to serve the public, care ought to have been taken by Lord Westbury that it was not in any higher capacity than that of gentleman of the chamber or train bearer, or in some

clerkship of which the duties were merely mechanical. Of course we do not mean to say that there might not be some excuse for what Lord Westbury did, but it was still a grievous mistake, and grievously has he answered it.

We now come to the Edmunds scandal. Of Mr. Edmunds himself we think it necessary to say but little—he clearly belonged to the "baser sort" of human beings; and we are not aware that any one has ever ventured to say a single word in his defence. His miserable attempt to raise a collateral issue touching certain proceedings between himself and some members of the family of Lord Brougham, when the sole question was respecting his own acts of embezzlement in the Patent Office, is not without a parallel in the experience of those who are familiar with the practice of our criminal courts. We have enough, however, upon our hands at present without entering on this clearly irrelevant inquiry; and we have only to express the satisfaction which we feel, in common with the whole profession, that even such an unscrupulous individual as Edmunds had nothing to bring against Lord Brougham himself, of whom it is cheering to think, in these days of strange revelations, that it may still be said, "*Intaminatis fulget honoribus.*"

With respect to the conduct of Lord Westbury in the Edmunds affair, we think the view presented in the Report of the Select Committee of the House of Lords is a just and sound view. They say:—

"In their opinion it was incumbent upon him [the Lord Chancellor] who presented the petition of Mr. Edmunds to the House of Lords, in some manner to have apprised the Parliament Office Committee of the circumstances under which the resignation by Mr Edmunds of the clerkships had taken place, and with which the Lord Chancellor was officially acquainted, and not to have left them to decide the question of a pension with no clearer light than that which could be derived from vague and uncertain rumours. The Committee have, however, no reason to believe that the Lord Chancellor was influenced by any unworthy or unbecoming motives

in thus abstaining from giving any information to the Committee."—Report from Select Committee, &c., pp. xiii. xiv.

Now we go quite as far as the above, and no farther. We have always been at a loss to see what "unworthy or unbecoming motives" Lord Westbury could have in desiring Mr. Edmunds to obtain a pension. Intending, no doubt, as he did, to fill up the vacancy by the appointment of Mr. Slingsby Bethell, it could matter very little whether Mr. Edmunds obtained a pension or not. Lord Westbury was at first under the impression that the power of dismissal from the office of reading clerk rested with himself as Lord Chancellor, but he had determined that whatever he had to do should be done under the direction of Lord Cranworth and Lord Kingsdown. This, we think, was the wisest resolve he made throughout the whole of these matters. Afterwards he found, on looking at the provisions of the statute, that the duty lay with the House of Lords. Mr. Edmunds' resignation, however, rendered it unnecessary for the House to exercise this duty. But in any case, how could it possibly have affected the appointment of Mr. Slingsby Bethell that Mr. Edmunds had not received a pension? One way or another Mr. Edmunds was sure to go, and Mr. Slingsby Bethell was sure of obtaining the coveted office.

It might have been that the Parliament Office Committee, with all the facts before them, might have thought Mr. Edmunds ought to have a pension for his lengthened services to the House, as there were no charges against him in respect of his office of reading clerk. The probability is, that as the "general knowledge or impression" which the Committee had as to the delinquencies of Mr. Edmunds in the Patent Office, did not lead them to seek any further information, they might not even have refused him a pension had they known everything. But without speculating as to what the Committee might have done, had all the facts been before them, it is quite clear that Lord Westbury ought to have communicated those facts to them. If he had asked the advice of Lord Cranworth

or Lord Kingsdown, we can have no doubt as to what that advice would have been. Surely he must have felt some misgivings when he determined not to apprise the Committee of what had come out against Mr. Edmunds. Any other man placed in the position in which Lord Westbury was, would certainly have consulted some friend on whose judgment he could rely. If he had only done so, what a world of trouble and vexation would it have saved him! But in this, as in all the other transactions in which his lordship was involved, one cannot but feel how unfortunate for him it was that he had no wise and judicious friend whose counsels he might have obtained.

With the Report of the Committee of the House of Commons on the Leeds Bankruptcy Court we are not so well satisfied, in so far as Lord Westbury is concerned, as with the Report of the Lords' Committee on the Edmunds affair. We think the evidence establishes something more than "haste and want of caution in granting a pension to Mr. Wilde" against Lord Westbury. It appears to us to make out a case of culpable negligence against his lordship. As to "haste and want of caution," that may apply to his signing the order for the pension without reading the medical certificate, but it certainly does not apply to the state of mind of his lordship in coming to a conclusion on the matter. "I was," he says, "painfully struck with the great inconsistency of having directed him to be served with a notice to show cause why he should not be dismissed and then permitting him to resign on a pension." * His lordship then vindicates his conduct by one of the most sophistical arguments which we think was ever used. "The inconsistency was obvious, but, at the same time, unless I determined to dismiss him, I had no alternative but to allow him to remain in that department." Very sharply and pointedly put, this, but entirely throwing aside the view of what it was his duty to do under

* See Lord Westbury's evidence before the Select Committee on the Leeds Bankruptcy Court.—*Minutes of Evidence*, p. 184.

the circumstances, which we clearly think was to go on with the proceedings against Mr. Wilde, and after the latter had shown cause, to give a fair judgment as to what ought to be done with him. That such was the right course to pursue becomes still more manifest from his lordship's own admission that the purpose he had in view in giving Mr. Wilde a notice to appear before him, was "that it might operate very much to the benefit of the public by showing what these proceedings had been, and by preventing such irregularities in future." And at another place he says, "I thought the case was so bad that it was quite right that it should be publicly investigated, and that the reproof, if it ended in reproof, should be given publicly in court."

We cannot but think that if his lordship had been left to himself he would never have acted as he was led to do, and that other parties whose motives were more questionable were urging him on to do the fatal thing which he did. Certain we are that if he had taken the advice of any of the other law lords he would never have so acted.

With respect to the appointment of Mr. Welch, we are not quite satisfied that the whole of the truth on this matter has come out. There is no reason, certainly, for attributing to Lord Westbury any knowledge of the dealings of Mr. Welch with Mr. Richard Bethell. But the fact of these dealings having been clearly established, and the appointment of Mr. Welch having taken place in the manner in which it was done, form a coincidence which we think was most unfortunate for Lord Westbury. We have, however, the explicit statement by his lordship of the grounds on which he appointed Mr. Welch to the Leeds Registrarship—and we can only say, that we are very much delighted to learn that the recommendations of the leaders of a man's circuit are considered to be of so much weight in the dispensation of patronage. We trust, for the sake of the public no less than of the Bar, that it will always be so.

We have very much the same observation to make on the

suggestion that Mr. Welch was to resign his office as registrar of the Leeds Court, in favour of Mr. Richard Bethell, and to receive another appointment in London, as we have made on the original appointment of Mr. Welch. We are not satisfied that we have the whole truth here either; and there are some coincidences connected with this branch of the inquiry, also, which are most unfortunate for Lord Westbury. But, as matters have turned out, we are unwilling to enter upon any discussion of this part of the case. Taking, however, what his lordship himself says, we cannot acquit him of great and culpable indiscretion in ever holding out any hope to Mr. Richard Bethell of his obtaining any new appointment. It was bad enough to have appointed him to any office of importance before; but, after he had been obliged to resign the London Registrarship, it was the height of folly to think for one moment of sending him down to the country as registrar of a court of bankruptcy. But we do not believe Lord Westbury would ever have thought of such a thing, had he not been worried by a set of people who seem to have acted in this matter with the smallest amount of sense that can well be imagined. The Dresden scheme, which his lordship himself proposed, was obviously the right and proper thing for Mr. Richard Bethell to adopt; and they were no true friends, either of that individual or of Lord Westbury, who encouraged the former to look for some office in the country. Had it not been for the foolish doings of his son at Leeds, Lord Westbury would most probably have still been in possession of the Great Seal.

We would rather, however, not make any further observations on Mr. Richard Bethell; and of the other inferior *dramatis personæ* we do not feel disposed to say much. Mr. Skirrow acted officiously and somewhat weakly, but we have nothing more to say against him. Mr. Miller we are not inclined to let off so easily. It is rather difficult to know what the Chief Registrar did or did not do, as everyone who reads the evidence must agree in the observation which has been so often made,

that the other witnesses contradict Mr. Miller on almost every point, and that he contradicts himself on many. But, at all events, we certainly think that he failed egregiously in his duty towards Lord Westbury, and did all in his power, by his ill-timed and foolish assumption of authority, and his imprudent zeal for Mr. Richard Bethell, to bring his lordship into disrepute. How such a man came to be appointed to an office which seems to involve great responsibility we do not know; but we do trust that future Lord Chancellors will show some discrimination in filling up such offices. There are many men practising at the Bar, whose ability and character can be easily ascertained, who would be quite willing to accept appointments of this nature. And it is really too bad that men who scarcely belong to the profession at all, and are not subject to the influences which it brings to bear on its members, should be allowed to creep into offices of this nature by some dark passages which are known only to themselves.

We cannot say, however, that Mr. Welch, although a member of the Northern Circuit for twenty years, does much credit to the profession in its more regular and authorised form. We can have no doubt that such men as the late Sir W. Atherton, Mr. Edward James, Q.C., and Mr. Mannisty, Q.C., would never recommend any man to the Lord Chancellor in whose character they had not confidence. No blame whatever attaches to them, although it shows that the judgment even of eminent leaders is not infallible. But in truth it was scarcely to be supposed that any member of a circuit, who had borne a good reputation, would be guilty of such conduct as Mr. Welch unblushingly avows. The thin veil which he attempts to throw over the transaction can deceive no one, and out of justice to those members of the profession who would rather starve than have recourse to any but honourable means for obtaining any appointment which Lord Chancellors or Prime Ministers have to bestow, we feel bound to express our unmitigated condemnation of the conduct of Mr. Welch. What proceedings ought

to be taken against him it is not, of course, for us to say; but we certainly think that it is not a case to be treated with leniency, and, if the law can reach Mr. Welch, we should regret if it is not put in force against him.

With Mr. Wilde, the *fons et origo malorum*, we should not be inclined to deal very harshly. We cannot but think, after carefully considering the evidence, that he has been far more sinned against than sinning. Whatever the state of Mr. Wilde's health may have been, he does not appear to be a man of very strong nerves; and we really see no reason to doubt the truth of his own account of the manner in which he fell into the trap so ingeniously set for him. After receiving Mr. Miller's letter of July 26, 1864, it would certainly have required some strength of character to reject the milder alternative put forth in that celebrated epistle. Of course Mr. Wilde ought to have done so; but some consideration must be had for the circumstances under which he was called to act on the instant, and the pressure that was obviously put upon him.

But leaving the inferior characters, let us return to the great central figure. After having looked through the whole of the evidence, we cannot but think that the true view of Lord Westbury's position in the matters investigated by the Committee was that stated by Mr. Bouverie in the House of Commons in moving his amendment; it was to this effect.

"He was a cordial supporter of the present Government, but he must distinctly declare that he had no confidence in the Lord Chancellor. It was impossible to read the evidence which had come before the Committee, without coming to the conclusion that there were grave faults in the administration of his office. He thought the House would generally agree with the opinion of the Committee, that there was no charge of personal corruption against the Lord Chancellor, but undoubtedly there was corruption in those around and under him."

The motion of Mr. Hunt was obviously conceived in a party spirit, and had party objects in view. It was clearly liable

to the objection pointed out by Mr. Bouverie, that it mixed up the faults of Lord Westbury with the corruption of those about him. On the other hand, the Lord Advocate's amendment was too lenient towards Lord Westbury, and introduced a matter which was entirely away from the question then before the House. Mr. Bouverie's amendment, it appears to us, exactly hit the blot. By bringing it forward, we think, he did great service to the country, and great service also to the Government, although they felt bound to oppose it. As that resolution may be considered as the final decree on the matter, in so far as Lord Westbury is concerned, we give it at full length.

"That this House, having considered the Report of the Committee on the Leeds Bankruptcy Court, and the evidence taken before them, are of opinion that while the evidence discloses the existence of corrupt practices with reference to the appointment of Patrick Robert Welch to the office of Registrar of the Leeds Bankruptcy Court, they are satisfied that no imputation can fairly be made against the Lord Chancellor with regard to this appointment; that such evidence, and also that taken before the Committee of the House of Lords in the inquiry into the circumstances connected with the resignation by Mr. Edmunds of the offices held by him, and laid before this House, show a laxity of practice and a want of caution in regard to the public interests on the part of the Lord Chancellor in sanctioning the grant of retiring pensions to public officers, against whom grave charges were impending which in the opinion of this House are calculated to discredit the administration of his great office."

A severe resolution unquestionably it was to which the House agreed, when the results to which it necessarily led are considered, but righteous we think, and just, when reference is had to the grounds on which it proceeded. Even if the Lord Advocate's resolution had been carried, we doubt whether the Government would have interposed any obstacle to Lord Westbury's doing what he had contemplated many months before. Under any circumstances, it seems scarcely

possible after the disclosures which had taken place, that his lordship could have retained the Great Seal. But independently of any circumstances of this nature, the House it appears to us would have stultified itself if it had not expressed its sense of the transactions brought before it in some resolution as decided as that to which it agreed. The feeling in the profession was certainly very strong on the subject, and there was much dissatisfaction in the public mind, that such things should have taken place as had come to light. It was impossible also for Lord Westbury himself not to feel conscious of the equivocal position into which he had been brought by those about him, and not to be aware that the woolsack could be no longer an easy seat for him, whether the blame that attached to himself personally was great or little. We see no reason for refusing to give credit to his lordship for such a very natural and obvious view of the case, although he has not formally given expression to it.

We have alluded to what we conceive to have been one great cause of the faults of Lord Westbury's conduct as Lord Chancellor—his not taking the advice of men who were qualified to give even him wise counsel in difficult and delicate circumstances. But we feel bound to say, that had he consulted all the law lords, all the equity and common law judges, and even all the members of the cabinet, he could not have expressed himself in a more dignified and graceful manner than he did in announcing his resignation in the House of Lords. Distinguished as he was during his Chancellorship both as a judge and as a legislator, nothing in his high office, we venture to think, became him like the leaving it. Deeply as we are convinced that the resolution to which the House of Commons agreed was a true and righteous resolution, we cannot but feel that it involved a great sacrifice for the sake of justice; and there are few men, we believe, uninfluenced by party motives, who will not regret that so hard a necessity had arisen and so disastrous a result had become unavoidable.

On the woolsack the same wonderful power of analysis

and the same marvellous gift of expression were displayed by Lord Westbury as at the Bar. The only fault which can be fairly charged against his judgments, is, that they sometimes show more of an antagonistic spirit than is quite suitable to the seat from which they were delivered. In estimating his merits as an equity judge, we are forced to rely on the opinions of others; but we believe we are correct in stating that in this capacity he has not disappointed the expectations of the profession. With respect, however, to his judgments in appeals from the courts of common law we can speak for ourselves, and can have no hesitation in ranking them among the *splendida arbitria* of the English Bench. We have only to refer to one of the latest of them, that in *Tapling* v. *Jones*, 13 *Weekly Reporter*, 617, as showing the manner in which his powerful and comprehensive intellect could throw new light on a point which had been repeatedly considered by the Courts of Common Law. Of the judgments delivered by him in ecclesiastical cases in the judicial committee, we have, on former occasions, expressed our opinion. Although the views stated in these judgments were those of all the other lay members of the court who had heard the appeals, the arrangement and the language were his, and well illustrate the characteristic qualities of his intellect.

Respecting Lord Westbury's merits as a legislator there may be some difference of opinion, but no one can doubt his boldness and originality, his comprehensiveness of view, and the grand object to which his aims were directed. No equally energetic law reformer has sat on the woolsack since it was occupied by Lord Brougham. Perhaps Lord Westbury was too bold—had too little respect for prescription—and was not sufficiently regardful of circumstances which men of a different quality of mind are better fitted to appreciate. All his measures have not, therefore, been successful; but still he has laid the foundation of much which will be found beneficial and enduring, and if, in the future, it should be deemed necessary to modify and alter some parts of what he has done, we feel assured that

in no case will it be considered desirable to reverse his policy.

Not the least interesting part of Lord Westbury's farewell speech as Lord Chancellor, was the passage in which he says,

"My Lords, with regard to the future I can only venture to promise that it will be my zealous anxiety, in the character of a private member of the House, to promote and assist in accomplishing all those reforms and improvements in the administration of justice which I think are yet required."

Much may, no doubt, be done by his lordship as a private member of the House in furthering these great objects; and we cannot but think that after what has happened he owes it as a duty, both to himself and to the country, to adhere strenuously to the resolution thus expressed. In doing so he will best be able to realise the hope which he expressed on the same occasion that "at a future time other thoughts will prevail, and that a feeling more favourable may be entertained towards him." To promote this object we would also venture to suggest to his lordship that it would be well if he would assume a more conciliatory manner towards others, and avoid every word which can justly give offence. We trust that the severe trial through which he has passed may not be without effect in leading him to adopt a less objectionable bearing, and to make some allowance for the feelings, and even for the failings of other men. We gather some hope that this may be so from the general tone of his last speech, and especially from the concluding words which he used.

"I have nothing more to add than to thank your lordships, which I do with sincerity, for the kindness I have uniformly received from you; and if, unfortunately, by some word of inadvertence or some want of courtesy, I have given pain to any of your lordships, I beg you to accept this expression of my regret."

Acting in the manner we have pointed out, Lord Westbury would still, we think, have a great career of usefulness and honour open before him. He has not taken bribes as a

judge, like Lord Bacon—he has not sold the offices in his court, like Lord Macclesfield. Whatever his faults may have been, they have not been such as to shake in the smallest degree the confidence of the public in him as a judge or as a legislator, and it lies entirely with himself, therefore, whether he will still, as a member of the House of Lords, confer lasting benefits on the country, and add to the laurels he has already won. There is no man who has greater power for good than Lord Westbury, if he will exercise the talents he possesses with wisdom and discretion. Placed as he will be in new circumstances, there will be no disposition, we feel assured, in any quarter, to judge him unfairly, or to withhold from him any praise to which he may be justly entitled. On the contrary, the disposition on the part of the public generally, will be to do him the amplest justice in all that relates to his future course, and to give him the fullest honour for whatever he may do for which honour is due. Independently of all considerations of his great ability, the fact that much of what has happened has been owing to the conduct of one of his own family, cannot fail to excite a generous sympathy on the part of the people of this country; and we need scarcely say that the more impartially the public consider the real facts of the case, they will be the better able to discriminate between that for which his lordship is really responsible, and that which must be laid to the charge of those who surrounded him—a result which we are convinced will be eminently favourable to the reputation of Lord Westbury.

Art. VI.—CLERICAL DISABILITIES.

IN March, 1862, a petition was presented to the House of Commons by Mr. Bouverie, from twelve clergymen of the Church of England, complaining of a grievance by which they were affected. Since their ordination, these gentlemen had formed opinions which they considered to be at variance with

the doctrines of the Church. Consequently, they had ceased to act as clergymen. Some had become, as far as the law allowed them, dissenting ministers, others priests in the Church of Rome, and others, laymen of the Church whose ministers they were formerly. Still, though they had done all in their power to relinquish their profession, they felt that their action was not sanctioned by law, and moreover, that they were still liable to many penalties and disabilities. To alter this state of things, they accordingly petitioned the House of Commons.

Upon reading that petition, and considering the law as it at present stands, we think there can be little doubt that the grievance complained of is real. It does not affect a large number of persons, and therefore there is some difficulty of its obtaining a hearing. Moreover, though theoretically the law is very much against these gentlemen, practically it is not. They do, and are allowed to do, many things which strictly are illegal, but the difficulties of enforcing the law are so great, that there is little fear of its being put in force. This state of things, however, is very unsatisfactory, and the laws are doubtless anomalous.

We now propose to consider this state of the law, the alterations proposed, and how far such alterations are advisable.

According to the 76th Canon (of the Canons of 1603)—

"No man being admitted a deacon or minister, shall from thenceforth voluntarily relinquish the same, nor afterwards use himself in the course of his life as a layman, upon pain of excommunication. And the names of all such men so forsaking their calling, the churchwardens of the parish where they dwell shall present to the bishop of the diocese, or to the ordinary of the place having episcopal jurisdiction."

There is no canon which defines the exact meaning of the phrase "using himself in the course of his life as a layman." It is plain, however, that the framers of the canon intended that no clergyman should engage in what are termed secular

pursuits. Some of such pursuits are clearly defined by statute. Thus by 1 & 2 Vict., c. 106, s. 28, 29 & 30, any beneficed clergyman, and any clergyman holding any kind of spiritual cure, is forbidden to farm any greater quantity of land than 80 acres, or to engage in trade for gain or profit, unless it be on behalf of any number of partners exceeding six, or in a case where any such trade or dealing shall have devolved upon him by virtue of any devise, bequest, inheritance, intestacy, settlement, marriage, bankruptcy, or insolvency, and in these exceptions, he cannot act as director or managing partner, or carry on business in person.

By statute 5 & 6 Will. IV., c. 76, s. 28, clergymen are declared inadmissible as councillors or aldermen in any municipal corporation. By 41 Geo. III., c. 63, no clergyman, whether priest or deacon, is eligible for a seat in the House of Commons.

According to Lord Denman's judgment in *Barnes* v. *Shore*, the fact of a clergyman becoming a dissenter or priest in the church of Rome does not exempt him from episcopal jurisdiction. Though he cannot be prosecuted for mere nonconformity, the act of non-conforming does not exempt him from canonical obedience to the bishop, as a priest, in regard to anything he may do according to the rites and ceremonies of the Church of England.

The penalties to which clergymen are liable for breaches of this canon and these statutes are various. A breach of the canon entails excommunication. If a clergyman farm more than 80 acres he is liable to a fine of forty shillings a year for each acre above 80 which he farms. If he trade, he is liable, for the first offence, to suspension for any time not exceeding one year; for the second, for such time as the judge shall think fit, and for the third to deprivation. If he sits or votes in the House of Commons, he is liable to a fine of £500 for every day he sits or votes.

The first and greatest of these punishments had more terrors formerly than it has at present. Fifty years ago excommuni-

cation was a formidable censure. There were two kinds, the less and the greater. The less excluded the transgressor from the participation of the sacraments; the greater from this, and, in addition, from the company of all Christians. Thus, by this latter sentence, an excommunicated man was disabled to do any act that was required to be done by a *probus et legalis homo*. He could not serve on juries; could not be a witness in any court, nor could he bring an action, real or personal, to recover lands or money due to him. In cases of excommunication for contempt, the general law came in to the assistance of the ecclesiastical courts, and permitted the bishop to certify the contempt to the Sovereign in Chancery, and thereon a writ was issued to the sheriff of the county, under which he was to take the offender and imprison him in the county gaol until he was reconciled to the Church. Many of these consequences of excommunication have, however, been abolished by statute 53 Geo. III., c. 127. By this statute it is provided that no person pronounced excommunicated shall incur thereby any civil penalty or incapacity whatever, save such imprisonment, not exceeding six months, as the ecclesiastical court shall direct, such sentence to be signified to the Sovereign in Chancery, and thereupon enforced by a writ *de excommunicato capiendo*.

The punishments for farming more than 80 acres, and for trading, only affect the beneficed clergy and those engaged in some spiritual capacity, and so do not touch the subjects of this article. In fact, as we have said before, the grievances complained of have in most cases more legal than real existence. The only penalties which really are of consequence are the fine of £500 for sitting or voting in the House of Commons, the prohibition from becoming aldermen or councillors, and excommunication.

If, acting in the capacity of physician, surgeon, attorney, or barrister, is "using oneself as a layman," the clergymen who are now acting in these capacities are liable to this latter punishment, but it is very difficult to ascertain who could apply

the punishment. An unbeneficed and unattached clergyman is supposed to be under the jurisdiction of no particular bishop. Who then would prosecute him? Some conscientious churchwardens of the parish in which the clergyman so acted, might deem it their duty to present him; but to whom could they present him? To the bishop by whom he was originally ordained, or, assuming that he had changed his abode, to the bishop of the diocese in which he resided? Practically the matter is out of the question. Most probably no bishop or churchwarden could bring the offender to justice, and if they could it is pretty certain they would not. Real respect for the opinion of society, or a dread of the consequences of outraging that opinion, are amply sufficient restraints.

The only real disabilities, then, which operate prejudicially, are the exclusion from the House of Commons and from a seat at a Town Council.

The latter exclusion we need not notice. If the former is abolished, this will quickly follow; therefore we shall confine our attention to it alone.

That a clergyman should be allowed to relinquish his profession we maintain on the grounds of justice to himself and the welfare of the Church. It is deemed essential to a Church like the Church of England, that there should be certain standards of doctrine which her clergy must accept, and accept thoroughly and *ex animo*. It requires little knowledge of the history of opinion to know that a man at one period of his life believes in doctrines which at another period he rejects. If the signature of articles and the solemn acceptance of creeds mean anything, they mean that the signer and acceptor believes in those articles and creeds at the time of his signature and acceptance, and that he will continue to do so as long as he remains in that capacity for which they qualify him. Should the time come when he disbelieves in that in which he once believed must he still act as though he believed? Must he still make the same professions, repeat the same creeds and, when occasion requires, sign the same articles? No

friend of the Church will say that he should. If his belief is not that of the Church it is better for him, and it is better for her, that he should cease to be one of her ministers.

This assertion doubtless implies various changes. When a man enters holy orders he becomes entitled to various privileges, and liable to various penalties. If he afterwards desire to relinquish his orders, in justice to the Church he should forfeit all his privileges: in justice to himself he should be freed from all his liabilities. It has been said, and is said, that to relinquish the clerical profession is impossible. Orders are indelible. We do not here desire to raise the question of the delibility or indelibility of holy orders; nor, when we speak of relinquishing orders, do we speak of the spiritual effects and characteristics of orders. We merely use the term as expressive of the clerical profession in its temporal capacity. But we would remind those who use the argument of the indelibility of orders against any change in legislation, that this doctrine is not in any way affected by the question. A may believe that holy orders are indelible, and B that they are delible, and the question is—Is B to suffer civil penalties because he does not agree with A? All that the gentlemen who petition Parliament for an alteration of the law ask, is, that they may not suffer on account of their opinions. They ask merely for toleration.

At the same time, it cannot be denied that there are certain difficulties in connection with those who have been clergymen entering Parliament. If, in the present state of the law, those who are now admitted to all the professions were eligible for the House of Commons, it might happen that a man would one day be a member of Parliament, and the next a deacon or a bishop. In the debate upon Horne Tooke's case, the result of which was the statute 41 Geo. III., c. 63, this was kept steadily in view.

"It will become the House," said Earl Temple, during the debate, "to recollect how very large a portion of the Church preferment is

in the hands of the minister of the day; and if once the rule is established that an unbeneficed clergyman can come into the House, how easy the means will be by which these members may obtain preferment, and afterwards defy you to deprive them of their seats."

Doubtless, were it to be allowed for a man to be one day a clergyman, the next day a member of the Lower House, and shortly afterwards a beneficed clergyman, the most direct and shortest road to canonries, deaneries, and fat livings, would not be by learning, or arduous parochial work, or even the strong claims of family connection, but by a seat in the House. But the clergy who, in this petition, pray for a release from professional ties, want no such thing. With their profession they ask to give up the status it confers. They wish to become, in a civil sense at least, laymen. They desire to be placed in such a position that they cannot legally perform the services of the Church without further action on the part of the authorities of the Church, such as re-admission or re-ordination.

That this can be accomplished by a properly framed Bill is plain. Such a Bill would simply have to provide that such clergymen who wished to relinquish their profession could do so by acting in accordance with a certain prescribed form. The simpler the form the better. It has been proposed that such clergymen should signify their intention to their respective bishops. The bishops would take notice of such significations, and, if persisted in by the clergymen concerned, would register them; and such registration would place them in exactly the same position, as far as the law is concerned, as they were prior to ordination.

The recent action of the Four Inns of Court has rendered such a measure more than ever called for. Clergymen can now be admitted to the Bar. Some are already practising. The highest honours of the profession are to be attained through Parliament. All, and especially members of the profession, must feel that it is scarcely fair to admit gentlemen

to the Bar and yet exclude them from its chief prizes and distinctions.

The question is not a party one, either politically or ecclesiastically. It is probable that during the first sitting of the new Parliament some such measure as the one we have described will be brought forward, and we have little doubt that it will be passed by both Houses. A small but real grievance will then be abolished, and justice done to the Church and her members.

ART. VII.—THE ROYAL COMMISSION ON THE LAWS OF MARRIAGE.

THE public we believe are not generally aware that, about three months ago, by the advice of the Lord Chancellor and the Attorney-General, a Royal Commission was issued under the Great Seal, to examine and report upon "The State and Operation of the Laws now in force in the different parts of the United Kingdom with respect to the Constitution and Proof of the Contract of Marriage; and the Registration and other means of preserving evidence thereof; and also into the state and operation of the Laws of the United Kingdom in relation to the Marriages of European British subjects in India and in the Colonies; and into the state and operation of such of the Laws of the United Kingdom as relate to the Marriages of British subjects in foreign countries." This Commission, therefore, has a wide scope. It embraces England, Scotland, and Ireland, with the Colonies and the East Indies; and it looks to foreign countries where British subjects form connections involving the difficult and unsettled doctrines of comity and reciprocity.

The Commissioners are Lord Chelmsford, Lord Naas, Lord Lyveden, Mr. Walpole, Mr. Monsell, the Lord Justice Clerk of Scotland, Mr. Justice O'Hagan, Sir James Wilde,

Sir William Page Wood, the Attorney-General, Sir Hugh Cairns, the Solicitor-General for Scotland, Dr. Twiss, and Mr. Dunlop, the member for Greenock. The Lord-Advocate has been obliged to decline the Commission, but takes the greatest interest in its proceedings; and will probably be the first to deliver his opinion.

A question preliminary to all others, and applicable alike to England, to Scotland, and to Ireland, would seem to be, whether boys of fourteen and girls of twelve should be allowed to marry. On this point the First Consul, presiding in the *Conseil d'Etat,* remarked, that "a marriage contracted so close upon childhood had but little chance of durability. It was absurd," he said, "to permit persons so young to enter into an engagement the most critical, and which ought to be the most permanent, of life." Therefore it was decreed, and is now the law of France, that no man under eighteen years complete, and no woman under fifteen years complete, can contract matrimony.

If this be a wise ordinance for France, the reasons have still greater force in our own country, whose people arrive more slowly than the French at mental and bodily maturity. For urgent reasons, in special cases, marriage in France may be accelerated; as where a girl of fourteen is found to be *enceinte.* To prevent scandal to herself and humiliation to her relatives, as well as to secure legitimacy for the offspring, a licence will be granted permitting her to marry at once, though under the legal age. Without offering any opinion either one way or the other, on this nice question, which gave rise to much discussion in the *Conseil d'Etat,* we submit that it cannot well be overlooked by the Marriage Laws Commissioners. Very recently a boy of sixteen was brought before the Metropolitan police authorities for deserting his wife—a woman twice his age.

With reference to the marriage contract generally, four distinct things seem absolutely indispensable. First, ample anterior notification of the intended connection, so that objections from all quarters may be stated and examined. Secondly,

certainty and publicity of the marriage itself, when entered into. Thirdly, official registration. And fourthly, preservation and accessibility of the evidence.* These four essentials are now moderately (we do not say completely) secured in England with respect to all marriages; whether under the sanction of the Church or before the Registrar. They are also secured more or less adequately in Scotland, so far as regular, that is to say clerical marriages are concerned. But they are wholly disregarded when the marriage is entered into irregularly in one or other of the several ways which the Scotch law tolerates.

We say tolerates, for the Scotch law does not sanction any one of these irregular connections; although from charity to the parties, and from compassion to the issue, it pronounces the thing done valid, but the mode of doing it a delinquency. Clandestine marriages are not merely irregular, they are absolutely criminal. Mr. Hume, in his admirable work on crimes in Scotland,† has a chapter on marriages which the law permits, but condemns.

"Although," he says, "our practice does permit or suffer, yet it by no means approves, or would encourage, the contracting of marriage in this private and unceremonious fashion—attended as it is with the hazard of rash and unsuitable matches, and even of incestuous and adulterous connections. On the contrary, it bestows on all marriages of this description the name of clandestine and irregular, and holds none for right or inoffensive but that which is celebrated by a priest duly ordained by the Church, and after proclamation of banns. To secure obedience in this particular the legislature has appointed various penalties. By the Act of 1661, c. XXXIV. the parties are liable to imprisonment for three months, and to certain fines according to their rank. In case of inability to pay, the offender is punished with stocks and irons."

* Now that divorces are granted at the rate of ten a day, all such sentences ought to be appended to the record of the marriage, otherwise the Register will represent parties as still manacled, who have been set at liberty by Sir Cresswell Cresswell and Sir James Wilde. The foreign lawyers have an express provision for such cases.

† Vol. I., p. 459.

The Commissioners, therefore, will have the support of the Scotch law itself, if they recommend (as we presume they will) the total abolition of these irregular and criminal conjunctions; which may be by clandestine clerical celebration without banns; or simply by the mutual consent of the parties *de presenti;* or by promise *de futuro cum copula subsequente.*

The Scotch doctrine of legitimation *per subsequens matrimonium* will next demand, and doubtless will receive, the attention of the Commissioners. The theory or fiction of this doctrine is, that at the moment of connection and conception a marriage is mysteriously contracted between the parties, the subsequent disclosure of the supposed engagement operating retrospectively. This, therefore, is one of the several private and irregular modes of constituting the nuptial tie in Scotland. Those who vindicate it contend that the law works beneficially by holding out to parents living in concubinage a wholesome encouragement and facility to legitimate their offspring. But the serious question is, whether illicit intercourse is not likely to be more than ordinarily frequent where the consequences are thus rendered capable of a reparation often hoped for, but more often disappointed. The prospect of ultimate legitimation seems pardonably to mitigate, but does not really lessen the turpitude, or alter the character of the actual dereliction.

It is, we believe, admitted that the official returns from Scotland present annually a large show of bastardy; but the answer is that in many instances legitimation takes place. The parties marry, and are restored, not indeed to full credit, but to a sort of mutilated and questionable respectability. The mischief therefore to them as individuals is less than it would be in England; but the sin is the same, and the example the same. Hence a certain amount of laxity in this respect is undoubtedly observable among the lower classes of a country in other respects remarkable for a strict and austere morality.

The indulgence we refer to, though now practically confined to the common people, extended formerly to the higher classes.

In the days of Bruce and Wallace, if we may believe popular songs and ballads (which some think the best exponents of ancient manners), ladies of rank and fashion had natural children without the slightest loss of caste. It would rather appear that their aberrations lent a charm and a romance to their character. Thus we read of an interesting "maiden" who had borne seven sons to her lover, and was "with child by him again." All this was of course to be set right by the healing remedy of legitimation *per subsequens matrimonium.* But then we are told of another case which was clearly beyond the reach of the doctrine in question; namely, that of a Scotch nobleman who had wedded eight wives successively "without finding one virgin among them." Our authority for this statement is judicial, as will appear by the following extract, which we take from Lord Jeffrey's review of the Scottish minstrelsy.*

"It is amazing, indeed, to observe with what invariable uniformity the circumstances of pregnancy and parturition are brought forward to heighten the interest of every love story. When Lillie Flower, for instance, is to be murdered by the ungrateful Jellon Grame, she says,

'Your bairn, that stirs between my sides,
Maun shortly see the light;
But to see it weltering in my blood,
Would be a piteous sight.'

"The Lass of Lochryan, in like manner, exclaims,

'And wha will father my young son,
Till Lord Gregory comes home.'

"The fate of the romantic 'White Lilly' is thus simply described,

'About the dead hour o' the night,
The ladye's bour was broken;
And, about the first hour o' the day,
The fair knave bairn was gotten.'

"The whole story of 'Willie's Ladye,' turns on a difficult delivery. The fair 'Lady Janet' commits a *faux pas* of the same kind; and so common does the indiscretion appear to have been, that the bold baron, her father, is made to inquire after in this easy manner—

* *Edinb. Rev.*, Vol. I., p. 404.

'Out then spake her father dear,
And he spoke meek and mild;
And ever, alas, my sweet Janet,
I fear ye gae with child.'

"'Fair Annie's' case, however, is the most aggravated. She makes the following very pertinent interrogatory :—

'But how can I gang maiden like,
When maiden I am nane;
Have I not born seven sons to thee,
And am with child again?'

"After all this, we are not surprised that 'Cospatrick'* wedded eight wives successively, without finding one virgin among them; though we think his lamentation, on the failure of the last experiment, rather too violent for the occasion :—

'I am the most unhappy man,
That ever was in Christen land;
I courted a maiden meek and mild,
And I hae gotten nothing but a woman with child.'

In a late case† it was held by the Court of Session at Edinburgh, that if the mother of a bastard, instead of marrying the father of the bastard, marries another man who dies leaving children by her, she can afterwards, by marrying her first love (the father of the bastard), render the bastard legitimate. This somewhat startling resolution was carried by the narrow majority of seven judges against six. Strangers ignorant of Scotch law may be affected by this ruling. Thus, suppose a Scotch laird to marry an English lady. On her death, leaving children, he may resume cohabitation with a former mistress, and, by marrying her, confer on his bastard progeny the *status* of legitimacy.

It is true the doctrine of legitimation *per subsequens matrimonium* is very highly descended, and comes of an ancient house. It has a Roman and canonical original. It is spread over Europe, and has been retained by the French code-makers, but with sundry modifications. Notwithstanding all this, the question remains, how does it work? And this, we believe, the Commissioners will look to.

* Cospatrick was Earl of Dunbar.
† *Kerr* v. *Martyn*.

Not the least of the evils which spring from these irregular Scotch engagements, is that strangers are as apt to be entrapped into them as natives. Take as a notable example the recent Yelverton case. There, both parties (the one an Irish gentleman, and the other an English lady) were but transiently resident in Scotland, when the entanglement took place. Both of course were ignorant of Scotch law, or had only a smattering of it; yet both were involved in a ceaseless conflict, which has now lasted six years, and which is still, after four varying decisions in the three countries, unconcluded; the gentleman having in the meantime married another lady, by whom he has children. Whether he has committed bigamy by this, his second matrimonial adventure, cannot be determined until the question as to the first marriage is decided; in other words, until the fate of a new suit demanding a reference of the whole matter to the defendant's oath shall have been ascertained.

The greatest of living jurists, Lord Brougham (still, happily for his country, in the full effulgence of an unclouded intellect) exclaims—"Can anything be more discreditable to the law of this empire, than that it should be extremely difficult to tell whether a man is married or not; nay, what is worse, whether a woman is married or not?"* His Lordship refers to the law of Scotland, but he might well have included the law of Ireland, as we shall see by-and-by. Mrs. Yelverton was pronounced a wife in Ireland by a judge and jury in February, 1861. She was pronounced a spinster in Scotland, by an able Lord Ordinary, in July, 1862. But his decision was reversed by the full, though not unanimous, Inner House, in December, 1862. This last adjudication was carried by appeal to the highest of all tribunals—a tribunal incapable of error, but here divided in opinion, and, so far as yet seen, incapable of terminating this endless litigation. Eight judicial intellects of the first order and the largest experience, assisted by the leaders of the Bar in the three countries, have proved

* Cla. & Fin., p. 917.

themselves unable to determine what, if the law were on a right footing, must always be a short question; namely, whether the relation of husband and wife has been established between two individuals who raise that sole issue for adjudication.

With reference to the difficulty, or rather the impossibility, of securing unanimity in the decision of such a case as this of Yelverton, we deem it a duty to direct the special attention of our friends in Scotland to the following weighty remarks of Lord Wensleydale.

"It is sad," His Lordship says, "to think that in the nineteenth century the law of marriage in Scotland should be left in such a state, that the proof of that most important relation in life should be sometimes left to depend upon the loose recollection of witnesses, of conversations so often misunderstood and imperfectly remembered, and sometimes on the meaning of an amatory expression and impassioned letters. We must, however, take the law as we find it."

A gentleman of respectable station, desiring to escape performance of his promise to marry, resorted to a scheme for the execution of which the law of Scotland gave facilities. He set up a pretended consensual secret marriage with one of his servants—a dairymaid—as an excuse for breaking his engagement. His plan succeeded, the young lady who had his promise released him. But soon afterwards the dairymaid instituted a suit to have the alleged private marriage declared valid and binding. This proceeding he resisted on the ground that what had taken place was not a marriage but a sham, concerted to deceive a third party. The Scotch Court, countenancing this view of the case, pronounced judgment against the dairymaid—and, what is more, the House of Lords confirmed this decision.*

Substantially the regular Scotch marriage resembles the English clerical marriage. There is, however, one prominent point of difference. The consent of guardians, required in England, in France, and we believe all over Europe and America, is not at all necessary in the northern division of

* In 1841.

this island. Strangers may be seriously affected by this state of things. Young persons repairing to Scotland, or there accidentally, can enter into wedlock in spite of the remonstrances of parents and relatives who may pursue them in the vain hope of preventing a disastrous connection. Having regard to the facility of this operation, a noble and learned lord * (master of all knowledge) put the following question to the present Lord Justice-General of Scotland.

"Suppose a young nobleman of fourteen is trepanned into a marriage by a woman of bad character of thirty or thirty-five, and he says, in such a way that it can be proved, 'I take you for my wife,'—and she says, 'I take you for my husband at this moment,'—would that be a valid marriage, and carry a dukedom and large estates to the issue?"

The Lord Justice-General answered in the affirmative; and the fact is that not only are boys and girls, of the respective ages we have mentioned, free from all control as to marriage in Scotland, but, if they are disposed to disobedience, they may even refuse to be educated. It has been said that no practical mischief has been found to arise from this state of the law; but the contrary is the fact. Mr. Fraser, in his valuable treatise on the personal relations,† records the triumph of a Scotch female child twelve years and five days old, who, determining to exercise what is called the privilege of puberty, informed her guardians that she intended to leave school and go abroad. The guardians in alarm applied to the Court of Session; but that high tribunal responded that they had no power, legal or equitable, to keep this wilful girl at school, or curb her passion for foreign travel.‡

* Evidence before the Lords' Committee, 1849.

† Vol. II,. p. 194.

‡ In the case of the Bute Guardianship, before the House of Peers, in May, 1861, Lord Cranworth put this question to the Respondent's Counsel. "Do you mean to affirm that in Scotland a boy of fourteen can say, 'I won't go to school?'" Mr. George Patton (not likely to be wrong) answered, "However strange it may appear, such is the law of Scotland; and the Court of Sessions has no power to mould it according to the dictates of expediency."—4 Macqueen's "House of Lords Cases," 45.

Some things, in the English practice not vitally important, would be objected to in Scotland. The canonical necessity of marrying between eight and twelve in the forenoon would be regarded as simply capricious and very inconvenient. So again the English custom of marrying in church would not go down in Scotland. The Scotch practice is to be married in a private house, never in a church. There seems no occasion for altering this. The Catholics of the old establishment were more liberal on certain points than the Church of England. Beau Fielding was married in his bedroom by a Spanish priest, and the marriage was held good to all intents and purposes.* Let us suppose that the Commissioners have done full justice to Scotland. They will next have to consider the Marriage Laws of Ireland, which, judging from the pointed remarks of an eminent writer, seem truly deplorable. In a most able paper, read before the Social Science Congress,† Professor O'Connor Morris states that,

"Any marriage celebrated in the Established Church of Ireland, may be set aside by a secret ceremony performed before a Roman Catholic priest, if both parties can be proved to have been Catholic. Any marriage celebrated in a Roman Catholic church in Ireland is avoided if one of the parties can show that, at the time or within twelve months, he or she was a professing Protestant; and any marriage in a Presbyterian church in Ireland may very possibly depend on the fact that one or both of the parties at the time was or were Presbyterian Protestants. The Irish Matrimonial Code is so lax that it encourages seduction, and so intricate that it endangers matrimony."

This is strong language, but not too strong. The evils of the Irish Law, with its train of hidden and treacherous impediments, seem mainly, if not wholly, the creation of the Legislature. And here lies the difference between them and

* We ought not to dismiss the consideration of the Scotch Marriage Law, without gratefully noticing Lord Brougham's Act (19 & 20 Vict. c. 96.) abolishing Gretna Green Marriages, an Act which has proved a complete success.

† In Dublin, 1861.

the Scotch, which last arise from what we must with all respect consider a perverse retention of exploded Roman Catholic dogmas, inflexibly adhered to by a community the most Protestant in Europe.

We hope in our next number to go more fully into the Irish law, and to show how imperatively it calls for examination, and ultimately for legislative interposition. We shall also have something to say as to the further objects to which attention is directed; the Commissioners being not only charged with the investigation of the laws of the United Kingdom, which relate to the marriages of European British subjects in India and the colonies, but with a still more serious and difficult duty, namely, the consideration of the laws of the United Kingdom, which relate to the marriages of British subjects in foreign countries.

This last branch of their inquiry will necessarily include what are called *in fraudem* marriages; that is to say, marriages of parties resorting to other countries with a view to escape impediments insuperable in their own. If this be a right construction of the Commission, the question as to the forbidden degrees seems inevitable.

Art. VIII.—CONTINGENT REMAINDERS—WRIGHT RHODES' GRANDCHILDREN.

THE maxim *cessante ratione cessat lex* ought to be a sufficient guide to keep the law in the right path while the times and manners are changing. But maxims, however broad and truthful, are powerless against rules once firmly established, although at a remote period. Thus, if a case happen to be within any of the rules handed down by Littleton in support of feudal service, the maxim which reason would bring out from the well-filled legal storehouse for the occasion is pru-

dently kept back, and the judge, with a halo of antiquity round his head, decides some question of a provision out of reality for children at their father's death, according to the principles which enabled the lord to call on his tenant to follow his banner to Tewkesbury or Bosworth field. The judge himself feels like one of Napoleon's generals at the battle of the Pyramids, with an indefinite number of centuries looking down upon him. It is only in a real property case not governed by the inflexible sway of feudalism, but affording some scope for philosophy, that he can venture upon the display of a jurisprudential aphorism. Then he does so with pride, much in the same way as an inhabitant of the city at which Napoleon's centuries are always looking down, ornaments his friezes above the level of the eye with illuminated texts from the Koran, while the rules of his actual life depend rather more on circumstances around him, than on the venerable precepts of Mahomet. In illustration of this take the following case.

Suppose that a grandfather, the owner of land, wishes to dispose of it by his will so as to give his son and his son's children the benefit of it in a simple manner. The wish would probably not be considered very arbitrary or fanciful, nor would the ardent advocates of a family agrarian law which is to put the ancestral acres on the same footing as bank annuities, find serious fault in an idea commonly entertained and carried into practice by a fund holder, who has two generations in his quiver. The landowner, then—let us call him Wright Rhodes, which is not an ill-sounding name for a hero in domestic life—takes heart and bravely thinks the matter over with himself. If he gives the land to the son in fee, it is possible that his grandchildren may never have a rood of it. He will give the son a life interest. Shall the land be simply devised to the children after the son's death? The objection at once presents itself, that a child might die under age, and before it could make a will, so that the eldest brother would succeed to a double share. The remedy appears easy. After the son's death let the remainder be to

his children, who being sons shall attain 21; and being daughters shall attain or marry under that age. Wright Rhodes thinks that this will do very well, and dies in a frame of contentment at the manner in which he has set his worldly affairs in order. We ask at once, is it not a stupid relic of barbarism, is it not an outrage on the ties of blood, if, when Wright Rhodes' son dies, leaving infant children and all the daughters unmarried, and if all the sons afterwards attain 21 and all the daughters attain 21 or marry, yet not one of them shall take a particle of the benefit intended for them by their grandfather's will?

Yet such is the law in this country up to the present hour. The maxim which we first cited gives place to another. At common law the freehold cannot be put in abeyance; or at common law the freehold cannot shift. Something or other that was fourteenth century sense, when no transfer of the freehold could be made without a ceremony visible on or near the land, remains as nineteenth century nonsense, when the common law fee-simple can be conveyed on a slip of paper at a writing-table.

"The gift," said Vice-Chanceller Kindersley, in his decision on Wright Rhodes' will, "being to such of the children as attain twenty-one, of course only such as attained twenty-one can take; but although there is no doubt that such was the intention, it is in the form of a contingent remainder, and once being so, cannot be said to be an executory devise. As it is a contingent remainder there must be a particular estate to support it, and therefore, it is not so much a question of intention as the consequence of a rule of law, and as there are no trustees to preserve contingent remainders, the remainder fails."—*Rhodes* v. *Whitehead*, 13 W. R., 800.

So, while the schoolmen of Lincoln's Inn are compelled to perpetuate this now fantastic jargon of scientific land-law, all these grandchildren of the landowner are, for aught that appears, deprived of every shilling of his estate. Not less merciless, in its way, was this rule to the infants whom Wright

Rhodes' son left behind him, a group of orphans stripped naked by law, than was the weapon that wrung from Macduff the cry, "All my pretty ones? Did you say, all?"

It would be wonderful if lawyers, being neither uncultivated in intellect nor shut out from sympathy with the world by any monastic kind of life, had not perceived how much the maintenance of the feudal rules governing contingent remainders had marred the enjoyment of landed property. It would be yet more wonderful, if, perceiving the evil, the lawyers had never tried to remedy it. But the matter is not so bad as that. In 1783, a Bill was prepared by Mr. Shadwell for preserving contingent remainders against the tortuous acts of the tenant for life; but for some reason not known, it was never passed. But the Real Property Commissioners of 1829, in their third report, were of opinion that merely to secure contingent remainders from destruction by the tenant for life, was scarcely sufficient to meet the inconveniences of the system. They therefore proposed that,—

"A contingent remainder, where the particular estate might determine before the period of the vesting of the remainder had arrived, should take effect as if it had originally been a future estate (becoming, in that case, liable to the rules prescribed for restraining perpetuities) and that the union of the particular estate, and the next immediate estate in remainder, should not have the effect of destroying it."

If the proposal (which, in fact, would treat a contingent remainder as an executory device) were adopted, the intermediate rents after the determination of the particular estate and before the happening of the contingency might, the Commissioners thought, either result to the settlor or go to the person entitled to the first vested estate. The Commissioners preferred the latter mode. After 15 years more had elapsed, the legislature thought fit to take up the subject, and passed the Act (7 & 8 Vict., c. 76) to simplify the transfer of property, making provision that no estate should be created

by way of contingent remainder, but that every estate which would have been such a remainder, should take effect (if in a will) as an executory devise, and (if in a deed) as an executory estate of the same nature. But the difficulty of applying this doctrine, which shifted the ground from one technicality to another, was exposed in the same year by letters to the Lord Chancellor from Mr. Bellenden Ker, who revised the Act in conjunction with Mr. Hayes and Mr. Christie; and from Mr. Josiah Smith, author of an "Essay on Executory Interests," in an appendix to his tenth edition of "Fearne." In the following year, accordingly, the provision was repealed, and it was then more simply and directly enacted by the Act to Amend the Law of Real Property (c. 106), that a contingent remainder existing at any time after the year 1844, should be capable of taking effect notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold, in all respects as if such determination had not happened. In this shape the law has since remained for 20 years, with only one-half of the Commissioners' recommendations adopted, the disregard of the other half allowing, year after year, the victims of legal superstition to be crushed under the still rolling wheels of feudalism. The current of law reform seems in these later days to have set more strongly in the direction of conveyancing, than of rules obviating the injurious consequences of an antiquated construction of instruments.

One praiseworthy exception to this indifference ought to be mentioned. The late Wm. David Lewis, an accomplished real property lawyer, when he was scarcely of age (for it was then that he put forth his book on Perpetuities), drew a Bill, in 1856, to simplify the title to real property, and generally to amend this branch of the law. The Bill is in the appendix to the report of the Title Registration Commissioners. Some of its clauses, as, for example, those relating to the seisin to serve uses, the exercise of powers, execution on judgments to bind lands, and power to assign to oneself and another, have been

very serviceable to Lord St. Leonards in his Propery Acts. Others of the clauses, relating to the incidents of mortgages, have probably been consulted by the author of the Trustees and Mortgagees' Act of 1860. Honour to whom honour is due. Mr. Lewis proposed that no remainder, or limitation by way of remainder, nor future estate or limitation in lands, although arising under any instrument then already made, should become void, or fail of taking effect, by reason or in consequence of its being or becoming a contingent remainder of the freehold expectant on the determination of a term of years, or particular estate for years, or by reason or in consequence of there being an interval between the determination or appointed time of the determination of the precedent or particular estate and the commencement or taking effect or appointed time of the commencement or taking effect of such remainder, limitation, or estate, or by reason or in consequence of the precedent or particular estate determining or expiring before the happening of the contingency or of the event, or the arrival of the time on or at which any such remainder, limitation, or estate is limited, or made to take effect, or by reason or in consequence of such remainder, limitation, or estate not being ready to vest at the time of the determination or precedent of the particular estate. Words were introduced excepting remainders then actually become void or incapable of taking effect.

A masterly clause in Lewis' Bill was one by which many of the rules of feudal origin in the limitation of estates would have been abrogated at one sweep, in the manner that the present Lord Chancellor has been known to aim at from the time when he became Attorney-General—the assimilation of the legal to the equitable rules of real property. The personal incidents of tenure having ceased for above two centuries to be part of the affairs of life, what separate existence, in any but a system of jurisprudential fiction, can equity have from law, as regards the construction of limitations? Since Serjeant Maynard's lease and release first baffled the Bargains and Sales Enrolment Act, there has existed no shadow of reason

why a devise to a son for life, and after his death to his children who shall attain 21, should fail as to the children, if the father dies leaving them infants, while a trust in the same words would not fail; nor any, why a conveyance to a son to hold from the father's death should be bad, but become good by the interposition of a use. It is needless to multiply such examples of anomaly. In this state of things Lewis framed an elaborate clause, of which the substance was that every estate or limitation should be deemed to be valid at law as well as in equity, and to be cognisable in courts of law as well as in courts of equity, notwithstanding that it were of freehold by deed otherwise than by way of use, to commence at a future day, or were a remainder out of a term of years, or were after or in derogation of a fee, or were to arise on a contingency to abridge the particular estate, or were what is called at law a possibility on a possibility, but all such estates should take effect as if there were no rule of law against them. By another clause the rule against perpetuities was saved; so that if such a Bill became law, that rule would be, as it ought to be, the only restriction on the disposition of land at law as well as in equity.

Until such a reform be made in the law, Lord Westbury may say again, with justifiable irony,

> "It is a sweeping censure which I would gladly have disproved or largely qualified, that, as a body, English lawyers have done little for the advancement of the science of jurisprudence. The neglect of this study is plainly evinced, by the contrast between the legal literature of England and of continental countries. Whoever will address himself to the task of directing a course of education in the philosophy of positive law, will become painfully aware of the poverty of English authors, whilst the catalogue of any French, German, or Italian library supplies numerous works, as well for the elementary as the more mature student in jurisprudence."

This was uttered ten years ago, at the inauguration of a society, "the Juridical," which it was hoped by the very

man whose Bill we have above referred to, and who was the originator of the society, would, many-handed, set about the work of adapting to the manners and wants of the day a mass of law, grown up through centuries of disputed successions, religious struggles, jealousies between layman and priest, and rivalry between territorial and municipal powers, into conflict with itself and incongruity with reason and common sense. There will be many lawyers, or perhaps we ought to say law practitioners, in the new Parliament. Let some one of them try whether his skill in amending this branch of the law be not equal to so important and yet so simple a task.

Art. IX.—LAW AND LAWYERS IN BRITISH BURMAH.

TO a judicial officer, returning to England after nearly a quarter of a century's service in India, few things appear more striking than the very general want of information subsisting among professional men at the Bar, and indeed on the Bench, as to the status both of the law and of lawyers in the East. On the other hand, few things are more gratifying than the evident interest with which reminiscences of service are received, and questions asked which show that India has—at any rate in the Inns of Court, if not in the Houses of Parliament—points of interest and inquiry. It is indeed startling to be asked, as the writer has been, whether trial by jury is known East of the Cape—whether any professional costume is worn by the judges and Bar in the Superior Courts of Law, and whether it was true that there were no law books "out there," "as the white ants ate them all up as fast as they were exported?"

Of India Proper—meaning thereby the great continent of Hindostan, the three Presidencies of Calcutta, Bombay, and Madras—the writer is not qualified to speak, his residence at

the Presidency Towns having been very short; but it has occurred to the writer that a few notes on Law and Lawyers in British Burmah and Ceylon (with the administration of justice in both of which settlements he has long been officially connected) would not be unacceptable to the readers of the *Law Magazine*. British Burmah especially, as the most recent of English acquisitions in the East, with its enormous trade in teak, rice, and the thousand other products of the tropics, is most interesting. Through British Burmah, in a few years, down the magnificent Irawaddy in Pegu, and down the noble and beautiful Salween in Tenasserim, will pour all the trade of Western China, all her silks and teas, all her gold leaf and cutch, all her *hlapet* (picked tea) and lacquered ware; while up the same streams will flow in an unbroken tide the cotton manufactured piece goods of Manchester, and every other description of the products of British industry. This trade is in a great measure already existing, but within the last two years enormous advances in development have been made. A treaty of commerce has been concluded between His Majesty the King of Ava (Upper Burmah) and the Governor-General of India; large mercantile firms are already in existence at Rangoon, and more are entering the field every day; more capital is being daily invested, and more openings for mutual commerce between Britons and Burmese are being investigated. In such a country as British Burmah, where contracts involving lakhs of rupees are of ordinary occurrence, and where there is often in the two ports of Rangoon and Maulmain, at one time, as much as 30,000 tons of shipping, it must be evident to any reflecting mind that there are charter-parties to be drawn and construed, questions of shipping and mercantile law constantly arising, and matters of international jurisprudence to be decided between the foreign consuls resident at both ports to protect and look after the foreign seamen of all nations—American, Russian, Belgic, French and Dutch—who swarm on the wharves, and who have constant "difficulties" with their commanders and ship-

ping masters. Business such as this (not to speak of practice in the courts, of which more hereafter), abounds, and pays well. It may therefore be worth the while of those at the Bar who have no strong local ties or attachments, and who desire to fill their brief-bags earlier and more rapidly than at home, to accompany the writer in a brief review of British Burmah and its courts of law.

If the reader will take a map of Asia, and cast his eye along the east side of the Bay of Bengal, a little below the Sunderbunds (close to Calcutta), or rather below the port of Chittagong, he will find that British Burmah commences with the province of Aracan, of which the capital (political and commercial) is Akyab: south of Aracan, but immediately adjoining it, lies the large and important province of Pegu, with its capital Rangoon, the head-quarters of the Government of British Burmah, and the principal focus of trade and commerce. Still further south, but still adjoining Pegu, are the contiguous provinces of Martaban and Tenasserim, with their thriving commercial capital, Maulmain. These three provinces, Aracan, Pegu, and Tenasserim, constitute the Grand Province of British Burmah, which is governed by a Chief Commissioner and Agent of the Governor-General, as a dependency of the Government of India. It is wholly distinct and separate from the Governorship of Bengal, both financially and politically, and communicates with the Foreign Office in Calcutta. British Burmah has a sea-coast line of not less than 600 miles in length, from north to south, with a width or depth of country inland from east to west, varying from 200 miles in Pegu, where we abut on the King of Ava's territories, in Burmah Proper, to 30 miles, or even less, in South Tenasserim, where we abut on the territories of the gentlemanly and intelligent King of Siam, our staunch ally and most worthy friend. This sovereign corresponds in English with the Commissioner, (Deputy-Governor) of Tenasserim, who is an English officer of rank in the army, and who resides at Maulmain. The writer has seen many of His Majesty's letters. They display

a courtesy and high feeling, as well as a degree of intelligence and dignity, which would rather astonish those who are apt to consider and talk of Asiatics as "niggers" and "savages," terms which the writer is sorry to say he has, with deep pain, heard used by those who ought to have known better.

But to return: the territory of British Burmah now described is, as was before observed, administered by a Chief Commissioner, resident at Rangoon, the highest local legislative and executive authority. Executive authority he undoubtedly has, and legislative also, in so far that any measure he proposes to the Governor-General is, without hesitation, laid before the Council in Calcutta; and such is the well-deserved confidence reposed in Colonel Phayre's administrative ability, that the measure generally passes, and becomes the law of the land. The Chief Commissioner, in addition to these large legislative and executive powers, is also the highest and final judge of appeal from all the Commission Courts, which will be shortly described. As such he can modify and review the judgments and sentences of all the lower grade of commission judges, in their several ranks of commissioners—deputy commissioners, assistant commissioners, and extra assistant commissioners—to the number of nearly 100, who form his official executive and judicial staff. Besides which, the Chief Commissioner holds, as agent to the Governor-General, power to commute sentence of death, even where such sentence has been passed by the Court of the Recorder, who has lately been appointed to be sole judge over the seaports of Rangoon and Maulmain. In fact, the Chief Commissioner's powers are almost practically absolute. He is unfettered by any council, either legislative or executive, as the colonial governors are. He controls all public expenditure, all adjustment of taxation; and, in view of these almost unlimited powers, it is indeed well for British Burmah, with its 3,000,000 of Asiatic inhabitants, that they rest in the hands of a man so able, safe, and experienced as Colonel Arthur Phayre, C.B., who knows the Burmese language well, having served some 30 years in the the country.

The writer will now endeavour to explain what are the Commission Courts of which he has spoken, and in which courts would lie a large proportion of the practice of any man going out with a view of practicing in his profession. They are established by an Act of the Indian Legislature, and are of all grades, from the Court of an assistant commissioner, with civil jurisdiction up to 500 rupees and criminal powers of two years' imprisonment, to that of a deputy commissioner with powers of long imprisonment in criminal cases and unlimited jurisdiction in civil suits, up to that of a provincial commissioner, who is an appellate judge in matters civil, and can in criminal cases pass sentences of transportation and of death, subject to confirmation by the Chief Commissioner. The judges of these courts, which are dotted about at distances of 30 or 40 miles all over the country, are chiefly, but not entirely, military men of all ranks in the late Company's, now the Queen's Royal Army, colonels, majors, captains, and lieutenants. They all of them know the Burmese language, and, having quitted their regiments on being taken into the civil employ of Government, are by the Chief Commissioner stationed at such towns and places throughout British Burmah as he conceives from their population or relative importance to require resident officials. As a body of men generally they make excellent judicial and civil officers, for, in addition to their magisterial and judicial duties, they have financial, revenue, and, in some cases, police duties to perform; in fact they each constitute, in his own division or district, to the native eye, the Government of the country. It must be well understood that the military rank of these officers has no connection with their civil status as judges. A captain may be a commissioner, or even a chief commissioner, while a major or a colonel may be only a deputy commissioner, or even only an assistant. It certainly does generally happen that military rank and civil services do progress together, and the three commissioners of the three provinces are at present colonels in the army; but this is, as we have explained, not necessarily the case.

The language used in the courts of these officials is Burmese, that is to say, the evidence is given orally in Burmese, though it is recorded in English by the presiding judge, who also interrogates the witnesses, and delivers his judgment or sentence, in Burmese. But it is quite competent to a barrister to address the court in English, and to interrogate his witnesses or the parties through an interpreter. A knowledge of Burmese doubtless is desirable, and any man intending to practice mainly in the Commission Courts, would of course set to work at once and master the language as soon as possible. Still, it is not essential, and the writer fancies that most men going out to practice would chiefly find their business in the Recorder's Courts at Rangoon, Maulmain, and Akyab, where English is the court language.

Owing to the want of duly qualified lawyers (and it is best to use this term in speaking of a country where the distinction between attorney and barrister is unknown, and where both branches of the profession are combined) a number of persons have been licensed and admitted from time to time, under the authority of the chief Commissioners and provincial Commissioners, to act as "PLEADERS" in the Commission Courts. Of these men, some are most able, and in every sense excellent men. They have not perhaps had a strict professional training, either for the Bar or as attornies-at-law, having in most cases come out from home originally with some other intention than the adoption of the legal profession; but some of them have for many years worked well and hard, and made large fortunes in the Commission Courts; while others are not what it could be wished they were, either professionally or socially. Of the former class, some hold their own well with barristers, several of whom are practicing in the Commission Courts; but of the latter, several applied, when the Recorder's Court was lately established, for admission as advocates of His Honour's Court, under Act XXI of 1863, and their applications were rejected.

Until January 1, 1864, such was the judicial system of the

whole of British Burmah, save and except that in the town of Rangoon, as the largest and most important town of the territory, was placed a Deputy Judicial Commissioner, an officer not existing in Tenasserim or Aracan, but only in Pegu. He had charge, judicially, of the district of Rangoon: but for some years antecedent to 1862, there had been a feeling prevalent among the large, prosperous, and wealthy mercantile community of Rangoon that their city had a claim to an English barrister judge, with all powers and functions such as appertained to the two Recorders of the Straits Settlements, at Penang and Singapore. After some unavoidable delay, the Government of India consented to the prayer of the many memorials on the subject which had been forwarded to Calcutta and to the Secretary of State, and passed Act XXI of 1863, establishing Recorders' Courts at Rangoon, Maulmain, and Akyab, to be opened at such time as should seem fit to the Governor-General in Council, and accordingly on January 1, 1864, a barrister (W. H. Clarke, Esq., LL.D.) who had previously held office in Rangoon as Deputy Judicial Commissioner, was appointed Recorder of Rangoon, and in May, 1864, the same gentleman was also appointed Recorder of Maulmain. So that two out of the three ports now enjoy the advantage of an English court of justice. It is much to be regretted that the Government of India did not, in constituting these courts, give them the full powers possessed by the Recorders of Penang and Singapore; and to the Recorder of the ports of Rangoon and Maulmain, the same titular distinction and honour which is held by Sir Benson Maxwell, the Recorder of Penang, and Sir Robert MacCausland, the Recorder of Singapore. These titular distinctions do add prestige to the office, and in a society such as that which exists at Rangoon and Maulmain, consisting almost entirely of military officers with duly assigned rank in society under Her Majesty's special Warrant on Precedence in India, it was doubtless a great mistake, a political blunder, to leave the newly-constituted Recorder unknighted, and with no ascertained precedence

whatever except such as he receives from the good feeling and courtesy of society. This will, however, probably be remedied. It was also a mistake not to confer on the Court of the Recorder, Probate and Admiralty powers. The following is an extract from the "Recorder's Official Annual Report for 1864" to Government on this latter subject, every word of which the writer emphatically endorses:—

"15. The Governor-General of India was pleased to direct the insertion in a late despatch of an expression to the effect that the unpopularity of a court must greatly militate against its utility. This is undeniably the case, and while admitting that the working of the Court of the Recorder has not been popular at Rangoon (though the reverse has been the case at Maulmain) yet I am able to point out that this unpopularity has arisen from defects in the powers of the recorder, rather than from the action of the Court in the exercise of the very limited powers it possesses. I quote the words of a public journalist when I say that there are 'defects in the Act which prevent a full development of the English judicial system, and have much impeded the speedy and satisfactory administration of justice.' The mercantile community of Rangoon, are, in respect of insolvents, worse off than they were three years ago under the operation of Spark's Code, which was then law. Then there was a species of insolvent procedure, which, at least, secured a fair division of the insolvent's assets; now, there is nothing of the kind; it is a general scramble, first come, first served, and whoever is cunning or shrewd enough to catch the first scent of a coming insolvency, has only to go into court one day in advance of other less wide-awake and more unfortunate creditors, and sweep away all, and then turn round on the sufferers and say, *Vigilantibus non dormientibus leges subveniunt.*

"16. Act VIII. of 1859 makes no provision for insolvency; and when an honest creditor defrauded as above finds that he has no redress, that he is worse off than he would have been under Spark's Code, he naturally concludes that the Recorder's Court is to blame. It is most difficult to make an exasperated and cheated creditor understand that we have no insolvent law which the recorder has power to administer, and hence one ground of unpopularity.

"17. Other deficiencies, contributory to unpopularity, are the entire want of probate or testamentary powers, and indeed of all jurisdiction over successions *ab intestato*, except to the limited extent given by Act XXVII. of 1860, in respect of certificate to collect debts; and all want of Admiralty jurisdiction which should surely have been attached to the chief court of ports eminently on the great highway to the proximate high seas. It is possession of these powers which have made the Recorder's Court at Penang and Singapore successful; it is the want of these powers which have contributed to the unpopularity of the Recorder's Court at Rangoon."

Thus far the report. It cannot be doubted, however, that these defects will be remedied in the present Session of the Council of India; and also that a separate recorder will be appointed to Maulmain, as it is impossible that one recorder should look after two large seaports, with 60,000 inhabitants, and 136 miles apart, by sea-going steamers. On this subject the Recorder says:—

"6. Tabular Statements No. 4 (see that No. in the returns for each court) show that the money value of suits instituted in the courts subordinate to the Recorder at Rangoon and Maulmain aggregated nearly 15 lakhs of rupees; whereof nearly 12 lakhs were in the Recorder's proper court, and the remainder in the Court of Small Causes; and it is observable that the value of suits instituted in Maulmain, in seven months only, exceeded by 1½ lakhs of rupees the value of suits instituted at Rangoon during the whole period of twelve months. I trust that this will be remembered in connexion with the remarks in respect of division of labour it will be my duty to offer before closing this report.

"7. Similarly, the court revenue derived from stamps, was, for seven months at Maulmain, nearly 25,000 rupees; and at Rangoon for the whole year 20,000. The total revenue from stamps and Tulubana fees paid over to Government aggregated over rupees 50,000; while the cost of the courts during the year has been certainly not in excess of rupees 70,000; though I am not in a position to state this accurately. The difficulty as to accuracy arises from the broken period of the year during which the Maulmain Court was instituted, and the fact that I am obliged to write at a distance from

the Rangoon Office, where the circuit accounts are kept, and where alone the amount of circuit expenses can be accurately ascertained.

"8. The total number of cases disposed of by the recorder, at both stations, in 1864, was 349; and it must be remembered that during the last seven months of 1864, four days at least have been lost in each month by the necessary time occupied in travelling from port to port. During the present year 1865, if the present system of circuits be adhered to, the number of days lost will certainly be not fewer than forty-eight, even supposing my successor in office adopts the course which I have repeatedly had to take, of proceeding straight from the deck of the steamer to the Court House, to enable me to commence the sessions on the appointed day and hour.

"9. Returns No. 3 (both ports) also show that in the Small Cause Court at Maulmain seven months' litigation gave 1,366 cases; while one year's litigation in Rangoon gave 1,370 cases only, or an excess of four only on the difference of five months. While Table No. 4 shows that the costs of suits in Maulmain during the seven months was rupees 50,283, against rupees 45,120 for the whole year in Rangoon. Since writing the former part of this paragraph, I have learnt, on the authority of the Commissioner of the Tenasserim and Martaban Provinces, that the late census shows the population of Maulmain to be over 69,000—and that of Rangoon about 61,000; doubtless an excess in population of 8,000 souls is in itself an element conducive to larger numerical indices of litigious statistics.

"10. To my mind there is only one conclusion to be drawn from all these facts; and that is this—doubtless Rangoon is the capital of British Burmah, and the head-quarters of Government; and it would naturally be supposed that it would be the focus of legal contention, as Westminster is of the litigation of England. Such, however, is not the case; the far greater proportion of litigation is at Maulmain, and it is litigation the recorder is appointed to look after, and not merely to be a dignified appendage to the Local Government. I am well aware that these views are not acceptable, and that I have most unwillingly incurred the displeasure of the Chief Commissioner by what he honestly believes to be my partiality for Maulmain: but, great as is my respect for the Chief Commissioner, and sincere as is my desire to meet his views whenever I can possibly do so, truth, and my duty to the public, demand of me a

positive expression of my conviction, either that Maulmain should be the recorder's head-quarters, or that Maulmain should have a separate recorder of its own.

"11. I beg it may be remembered, that I do not for one moment admit that I have shown any partiality to Maulmain over Rangoon. The number of judicial sittings—day for day—at Rangoon has, during the past year, equalled those at Maulmain, excepting only one month, November, when the results of the cyclone impeded transit. But I am satisfied that on my return from England I shall find Mr. Kennedy of my opinion; first, that Maulmain is the head-quarters of litigation, and that no one man—be his abilities and energy what they may, can, under existing circumstances, adequately do the duties of recorder of both ports.

"12. The reason of this preponderance of judicial work at Maulmain over that at Rangoon is most obvious; the trade of Rangoon is mainly, if not entirely, a ready-money trade, not perhaps in coin or cash, but in convertible bills realisable at a moment's notice, and irresistible as proofs of debt—the trade of Rangeon is chiefly in rice, and piece goods, the latter almost always sold for cash, or for the tangible representative of cash, accepted bills; and the former brought in by natives, without advances (as a general rule), who deliver their crops and take their money away, and there is an end of it. At Maulmain, on the other hand, the main, I may say the sole business, is in timber, and the sole way of getting timber is by advances to middle men, contracts—sale or assignment of hammer marks—and missions of subordinates to foreign territory on especial engagements. At every step arises matter for a suit; the trade is one, in its own nature, of a highly speculative, indeed I had almost said of a gambling nature; and what with disputes with subordinate contractors, difficulties about brands and hammer marks, division of advances, and disputes on arrival of the timber at the Revenue Station of Kadoe, nearly every speculation has its attendant suit in court, as a necessary satellite."

The courts of the recorder, as organised by Act XXI., of 1863, are courts of record, and it is competent to the Governor-General to appoint one judge, being a barrister of not less than five years' standing, to be recorder of the three ports of

Rangoon, Maulmain, and Akyab, or of any two of the said ports, or a separate recorder for each port: and it is provided that so long as there is only one recorder, he shall hold civil and criminal sessions at Maulmain not seldomer than once in every three, and at Akyab not seldomer than once in every four months. No recorder's court has yet been proclaimed for Akyab, so that the judge who is at present Recorder of Rangoon and Maulmain divides his time equally between the two ports, sitting a fortnight at each alternately. The jurisdiction is very extensive, involving powers of capital punishment in all cases wherein the accused person is not an European British subject, to whom, and to whom alone, is reserved by the Act the right of trial, in capital cases only, by the High Court of Calcutta, and a jury of 13. All cases, not capital, wherein European British subjects are charged, and all cases of every description against natives, and Europeans, and Americans (other than British subjects) are cognisable by the Recorder's Court with a jury of five men—the number statutably fixed by the Governor-General, by proclamation, under the provisions of the Act of the Indian Legislature, called the Code of Criminal Procedure.

Before the Recorder's Act was passed, there was no court in the whole of British Burmah with authority to dispose of the simplest charge against an European. Such a person on being brought before a magistrate or justice of the peace had only to claim (not even to prove) that he was an European, and the magistrate was compelled to commit him for trial in Calcutta, and to send prisoners, witnesses, jail guards, &c. &c., up by steamer to Calcutta, a long and expensive sea voyage, occupying, there and back, nearly three weeks, besides detention in Calcutta. The frightful cost of all this to the Government may well be imagined, nor will it excite surprise to be told that this gave practical impunity to many offenders whom the magistrates hesitated to commit owing to the immense expenditure of public money it would involve. Did a Government clerk embezzle his employer's moneys for a series of years,

the Government authorities wisely considered that the ascertained loss was quite enough, without the cost of a possibly non-effectual prosecution, and so the offender got off with dismissal from office.

There is no Grand Jury. The responsibility of committal rests entirely with the magistrate, and the following extract from His Honour the Recorder's last Annual Criminal Report shows that this discretion is not always carefully exercised.

"3. Two cases have occurred during the year which led to much remark: one was a scandalous case from Tonghoo, in which several European females, and two or three military officers of rank were sent down from Tonghoo to Rangoon at great expense to Government, and loss to the public service. The Government Advocate at once saw clearly that the prosecution could not be maintained, and, with my entire approval, offered no evidence, and the accused was acquitted and discharged.

"The other was a somewhat similar case from Prome. A Government clerk was charged with embezzlement, but the evidence was not such as to warrant a hope of conviction; the acts committed partaking rather of the character of incorrect account keeping than of criminal breach of trust. In this case, too, the Government Advocate declined to prosecute, and the prisoner was discharged.

"I mention these two cases as the basis of a suggestion that the magistrates before finally committing to the sessions might be requested, in all cases, to take, in the first instance, the legal opinion and advice of the Government Advocate, which might save much expense, trouble, and annoyance."

The Recorder has also to hear all criminal appeals from the sentences of the magistrates' courts in the two ports; but these are not numerous, not perhaps more than twenty per annum. The following testimony by the Recorder to the good demeanour of the general population will be read with interest.

"It is doubtless observable, that in two large seaport towns, aggregating in population about 130,000 souls, there should not have been one capital sentence inflicted during the whole year. This is most satisfactory evidence of the good order and general good

conduct of the masses, and of the efficient conduct of the local police.

"2. In one case only was it deemed necessary to pass sentence of death; and this was done rather with a view of showing the population that death might be the result of lawless violence, even though the hand which inflicted murder might remain unapprehended. This was a case where a young man was beaten to death in a faction fight between two rival sets of paddy huskers, and it did not clearly appear that the prisoners, three in number, (who were on the clearest evidence convicted by the jury of the crime of aiding and abetting in murder), had any of them actually struck the deceased the mortal blow, of which he died. I, therefore, deemed it my duty to recommend a commutation of their sentence to the Chief Commissioner, who accordingly commuted it into transportation for life.

"3. In one case, that of a Government clerk, who by a long series of peculations had defrauded his employers of large sums, during a period of considerable length, I felt it necessary to pass a sentence of lengthened imprisonment: and the only other serious case I have to note is that of an American (coloured) seaman, whom (having been convicted of aggravated assault, and stabbing his captain and mate on board ship in harbour) I thought it necessary to imprison also for a long period; such offences having latterly become too common in the Maulmain River.

"In another case of dacoity, the prisoners, of whose guilt there could be little moral doubt, were acquitted, probably because they did not consider the unsupported evidence of an approver (the only direct testimony) sufficient to warrant a conviction."

On the civil side of the court all suits below 500 rupees in amount are heard and decided by the registrars of the court, of whom there are two, enjoying handsome salaries of £960 per annum each. These gentlemen at present are neither of them professional lawyers, but when they are removed or promoted, it is probable their successors would be selected from the Bar, if any such candidates appeared. The Recorder hears and decides all cases exceeding 500 rupees in amount, without a jury (except in cases where he may, of his own motion, call in two or three experts as assessors), and there is no appeal from

his finding in cases between 500 rupees and 3,000 rupees; above this latter amount, an appeal lies to the High Court at Calcutta, and in matters of 10,000 rupees the only appeal is to Her Majesty in Privy Council. Two appeals of this last kind are pending at Whitehall.

The Recorder can grant a new trial in any civil matter tried before him, provided the same is applied for within 30 days after decree, or within three months thereafter in suits for landed estate.

The foregoing extracts will give the reader a good idea of the amount of work going on before the Recorder, and the consequent existing demand for professional assistance on the part of the mercantile community, nearly the sole litigants in the Recorder's Courts. By the Act constituting these courts, their powers were limited to the towns and their immediate precincts, say to a radius of four miles round the centre of each town; the powers of the previously existing Commission Courts within those towns were abolished, though for convenience of the Bar and suitors, they continue to hold their sittings as before within the towns for cases arising outside the precincts. The salary assigned to the Recorder is £2,000 a year, and he is entitled to all the advantages in respect of leave, furlough, and pension, which attach to the members of the uncovenanted civil service, no small element of consideration in a pecuniary point of view.

As to professional fees, they are much higher than in England. There are two or three barristers practicing at Rangoon and Maulmain, and about a dozen advocates of the court who are not barristers, but were formerly pleaders. Few if any of them make under 1,000 rupees (£100) a month; and it is within the knowledge of the writer that 5,000 rupees and 7,000 rupees a month have lately been made; in fact, in one case which came before the Recorder at the Maulmain sessions, in December last, it was stated that the plaintiff's advocate received a fee of 400 gold mohurs, or something close upon £700, for his day's work, and the case only occupied one day,

the plaintiff being non-suited. This was perhaps an extraordinary case, but the writer feels satisfied that there is ample room for good men, hard-working men, and steady men; others had better remain where they are.

The expense of living at British Burmah would of course form an important element for consideration in the case of a young barrister going out to seek his fortune there—as a large income is not of course so valuable where it is necessarily combined with proportionally large expenditure. A man must, owing to the heat of the sun in the middle of the day, keep a horse and carriage of his own; the wretched public *gharries* or cabs, which you hire at two rupees a day, being positively filthy in most cases; and he must have a house of his own, as there are no clubs or hotels. But, taking everything into consideration, it may safely be stated that an unmarried man can live respectably and most comfortably—as a gentleman and a barrister ought to live—on 350 rupees to 400 rupees a month; while a married man with a small family would, perforce, have a considerably larger outlay to meet—say 600 rupees to 700 rupees a month.

Some may think these estimates high, but when you consider that you must have a butler, cook, table servant, groom, sweeper, washer-man, &c.,—for all servants are of the male sex—in the smallest establishment—not one of them will do the work of any other servant—the writer thinks you will not be surprised at his estimate. English articles of food, such as hams and cheese, are double the English price, and a man soon begins to find he cannot relish constantly the eternal chickens of the country, though they cost only from four to five shillings a dozen. Then, again, beer and wine are dear. Allsopp's beer sells at Maulmain at seven rupees, or fourteen shillings, a dozen. Decent sherry is not to be had under 32 rupees or 35 rupees, and good brandy costs 42 rupees to 45 rupees per dozen. Of course, an economical and temperate man may regulate to extreme nicety his wine and beer expenditure; but British Burmah is not England, and there is much more hospitality

there than here. Everybody knows everybody, and nearly everybody dines with everybody once in six months or so, and it does not do for a man to be singular.

As to the climate, let no one be afraid of that. Doubtless it is hot in the middle of the day out in the sun, but that is exactly where no hard-working man ought to be at that time. In his office or in court from ten to five, with the punkah constantly going backwards and forwards over his head (pulled by an officer of the court), and plenty of iced water in the advocates' chamber, a man ought not to complain of heat. If a man will only go to bed early, say at ten p.m., and rise at four, mount his horse for a six miles' trot, come home, bathe and dress, and take a good solid breakfast, without beer, and then go to his office or court, and take nothing there but a glass of sherry and a biscuit at one p.m., he will find himself all right for his dinner at half-past seven, after another ride or drive, and after his dinner quite ready to go to early bed. If a man would live in this way, it is the writer's belief that most people, with any constitution at all to begin with, might live as long, and enjoy as good health, as in England. Once for all, it is not the climate which, as a rule, knocks men up. It is gadding about in the sun in the day time; visiting and shopping when they ought to be in the office; and then the heat demands "pegs" of brandy and soda—and the necessity for these becomes greater daily—and then men die, as the Irishman said, and say it was the climate.

It is quite true that, some years ago, Aracan was unhealthy and feverish; and was especially mentioned on the back of policies of life insurances as one of the places residence in which, without special permission of the directors, would vitiate the policy, or subject the insured to a much higher rate of premium. This is, however, now altered, and the offices take risks of life in every part of British Burmah at the same rates.

This article has run to such an unreasonable length, that

observations on the systems of law administered to the different races found in Rangoon and Maulmain, must be reserved for another occasion. So many Chinese, Mahomedan, Tamul, Hindostani, and other settlers are found at other parts, besides the aboriginal Burmese, that it would be impossible within the limits of this article to describe their several peculiar customs, recognised by the law and observed in the courts; though the general spirit of procedure is in conformity with English principles, and with the legislative acts passed by the Supreme Council of India in Calcutta. There are special codes of civil and criminal procedure, and penal codes which a man might study on his way out on the noble deck of a Peninsular and Oriental Company's steamer, and which can be procured in England. Further observations must, however, be deferred, and Ceylon must await another occasion. The present paper, may, the writer ventures to hope, form some guide to those who are thinking of seeking a foreign field for honourable exertion.

Art. X.—MARRIAGE WITH A DECEASED WIFE'S SISTER.

THE policy or impolicy of the existing law which forbids a widower to marry the sister of his deceased wife, has been for many years a favourite subject of debate with those who take an interest in what are called social questions. The subject is one on which many theologians entertain strong convictions:—convictions of which they feel that they cannot yield one tittle, without being false to the cause of truth and to the best interests of mankind. The present condition of the question is somewhat remarkable. At a comparatively early period in Church history, marriages between persons in such relations were forbidden by a provincial council, and whether from growing asceticism or improving morality, the prohibition thus

established was adopted by the Church of Rome, and became a component part of the *jus canonici.* As in many similar regulations, however, the Church was not averse to exercise its dispensing power for a pecuniary consideration, and its right to do this remained unquestioned until our own Henry VIII., disputed the validity of the Church's dispensation in such a case, when he wanted to obtain a divorce from Catherine of Arragon. Every one knows how the King's conscience, after remaining easy for many years, was awakened to a sense of his sin by the charms of Anne Boleyn; how in the renowned dispute which followed, the Pope vacillated and Wolsey temporised; how the monarch lost his patience, and the minister his place; how, when the involvement was at its worst, Cranmer hit upon that happy thought of referring the matter to the European universities, which gave to the King the liberty he craved, and to the clerk, court favour in possession, and the Archbishopric of Canterbury in reversion. From that time to the year 1835, the propriety of such marriages remained practically *in dubio.* By the Church and the ecclesiastics, they were treated as *mala in se,* but by the State and the laity, as *mala prohibita* only. In every year, a number of persons were found willing to brave the censures of the first, from the very indulgent view of their conduct which was taken by the second. But at length circumstances arose which gave to our legislation on this subject a character pre-eminently anomalous, even in a system abounding with anomalies.

Marriages within the prohibited degrees of affinity had been treated, not as void, but as voidable only on a decree of the ecclesiastical courts, in a suit regularly instituted. Proceedings in such a suit could only be taken during the lifetime of *both* the contracting parties, and as, when a suit was pending, no second suit could be commenced until the first was disposed of, it became a common thing for some friend of the family to take the first formal steps in a cause, and thus prevent any proceedings by parties really anxious to invalidate the marriage. The terrors of the law, therefore, ceased to have any practical

effect, and the suit for a decree of nullity had become as much a matter of form as levying a fine or suffering a recovery. But in 1835, an exceptional case arose. The late Duke of Beaufort had married the sister of his former duchess, and the parties entitled in remainder had been sufficiently on the alert to put the succession of the present duke in jeopardy. This led to the introduction of Lord Lyndhurst's measure, by which it was proposed to remedy some of the hardships incidental to the state of the law we have above described. All voidable marriages then existing were to be rendered valid, and no such union was in future to be assailed, after the expiration of two years from the time of contracting it. The Bill had passed both Houses, and had reached its final stage in the Lords without material alteration, when the late Bishop of London insisted upon the introduction of a clause providing that from the passing of the Act, these marriages should cease to be voidable only, and should become void absolutely and *ipso facto*. The Commons demurred, but the bishop was firm, and his following was sufficiently numerous to make it unsafe to risk a division. The session was near its end, the sacred grouse were on the wing, and every one was anxious to get away from town. The supporters of the bill were disposed to reject it altogether, rather than accept it in its altered form, but it was urged that to do so would be to leave the interests of the House of Beaufort in jeopardy for a considerable period. Thus pressed, the Commons gave way, on the understanding that their cause of complaint was to be removed by a supplementary measure early in the following session. Other and more pressing matters, however, interposed to prevent this, and after a few years it was insisted that the Act of 1835 was to be accepted as a final compromise between the two parties, any attempt to disturb which was to be strenuously resisted.

This arrangement has, however, shared the fate of all similar attempts at making extremes meet. Marriages between a deceased wife's sister are within the ecclesiastical prohibition, and consequently they are also within the legislative penalty.

But there are numbers of persons who maintain that this particular prohibition is unreasonable, and its penalty unjust; that the compromise of 1835 was morally objectionable, logically indefensible, and practically injurious. Accordingly, ever since 1841, proposals for the repeal or modification of Lord Lyndhurst's Act have supplied matter for legislative debate and popular agitation. In 1841, Lord Wharncliffe introduced a Bill for the legal recognition of these marriages into the House of Lords, and in the following year, the late Lord Ellesmere, then Lord Francis Egerton, made a similar attempt in the Commons. A Royal Commission to inquire into the working of the Act of 1835 was issued in 1847, and in 1848 the Commissioners reported strongly against the continuance of this individual restriction. Thus encouraged, the advocates of change renewed their efforts, and nine times since 1848, they introduced Bills to carry into effect the recommendations of the Royal Commissioners. On seven occasions, the Bill was passed by the Commons, but rejected by the Lords, though the adverse majority annually diminished, until, in 1859, it had dwindled down to ten. At this point, however, the tide turned. The opponents of these marriages took heart of grace. They adopted the tactics of their adversaries, and resorted to public meetings and other expedients of political agitation. The result was seen in the altered state of the division lists, and a growing tendency towards a Conservative reaction on this, as on other subjects. For the first time since 1842, the Commons, in 1861, threw out the Bill, and in 1863 the numbers were, for going into Committee 116, against it, 148; majority, 32. From that time no further efforts were made in the late Parliament, the subject, like many others, standing over until parties had once more an opportunity of measuring their strength at the polling booth. With the meeting of the new House, however, the discussion will most probably be revived, and the present would therefore, seem a favourable opportunity for calling our readers' attention to some of the chief arguments upon it.

Upon the purely theological part of the question, we would gladly say nothing, but for the fact that no review of the arguments on each side would be complete without some reference to it. Between the rival expositors of the eighteenth chapter of Leviticus, it is not our province to decide. Lawyers have the reputation of being a contentious race, and the differences of doctors have passed into a proverb, but neither forensic nor medical antagonism can compare with the bitterness of polemical controversy. The theological difficulties of the present subject are shown by the manner in which men of opposite parties are to be found on either side. For example, we find Archbishop Whateley condemning the restriction, and Archbishop Sumner defending it; Bishops Blomfield and Philpotts maintaining the law as it is, while Bishop Tait and Dean Hook contends for its speedy alteration. The prohibitionists maintain that the passage in Leviticus clearly forbids these marriages. The abolitionists, that it as clearly allows them. To make out their case, the former class are compelled to resort to a somewhat laboured argument, to prove that the Hebrew law regards relationship by affinity in the same light as by consanguinity; a dogma to which the common instinct of mankind affords but slender support. The view of the abolitionists is much more reasonable. The passage under notice says, "neither shalt thou take a wife to her sister to vex her" (Lev. xviii. 18). This can only be during the wife's life, and it is a prohibition of polygamous marriages with sisters, such as those of Jacob with Leah and Rachel. The sixteenth verse of the same chapter is relied on, as proving by analogy the soundness of the restrictive interpretation. But that verse does not forbid a brother to marry his brother's *widow*; it is a special injunction against adultery in the family, as is evident from the obligation existent from patriarchal times, that a brother "should take his brother's wife and raise up seed to his brother." If the affinity = consanguinity doctrine be received, all the parties to the marriage mentioned by our Lord (Matt. xxii. 23 to 28) were guilty of incest. Yet, according to these expositors, the Divine teacher of Nazareth

allowed a peculiarly revolting instance of this atrocious sin to be brought under His notice, without uttering a word in its condemnation! But the fact is, that no one really believes marriage between *affines* to be the same as between *consanguinei*. Let E be a widower, and F his son. Let G be a widow, and H her daughter. E marries G, and F marries H. There is no law against this second union. And yet if the prohibitionist theory is correct, F is married to his mother's daughter, and H to her father's son; an illustration which might serve as a *reductio ad absurdum* of the theory, even if Lord Lyndhurst's Act itself did not provide "that nothing therein contained shall affect persons being within the degrees of consanguinity." *Expressio unius et exclusio alterius.*

The testimony of history in favour of allowing these marriages is exceedingly clear. *Optima est legis interpres consue tudo* is a good maxim, and when applied to this subject it proves that the Jews did not understand the passage in Leviticus to forbid unions of this nature. Nor can this be ascribed to the Jews' decaying reverence for the law as given by Moses, to "their hardness of heart, or contempt of the word and commandment." Neither in the psalms, the prophets, nor the historical books is there any passage to show that contracting matrimony in this way was regarded as a sin at any period of Jewish history. Denunciations against incontinency are many and various, but nowhere do they include these marriages within their scope and condemnation, at least in the opinion of Hebrew expositors, who may be considered best able to judge of the meaning of their own language. And it is not disputed, that for 300 years at least, the Christian Church held the same opinion. Not till A.D. 305 did a provincial council condemn these marriages, and not till 50 years later was the prohibition regarded as generally binding. And long after this time the point was at least debatable, and only as growing asceticism led the Church to treat all marriage as simply a carnal indulgence, did she subject the parties to such unions to anything like the severity we practise

towards them. The Council of Eliberis (A.D. 305) punished incest with perpetual exclusion from communion; marriage with a deceased wife's sister with five years' suspension only. The difference between these punishments surely points to a conclusion very different from that which the advocates of the identity of affinity and consanguinity would have us adopt, even if we were not aware that the lighter of these punishments was inflicted upon persons who contracted third marriages. The connexion of Herod with Herodias is sometimes cited by the defenders of the law as it stands; but in that case Herod had committed adultery with his brother's wife, and had subsequently married her, while her husband was alive, and consenting to this flagitious transaction.

The purely legal part of the argument is exceedingly unfavourable to the advocates of the existing law. Many of the more candid among them admit that the interpretation of the passage in Leviticus is at least doubtful, but they rest upon ecclesiastical usage, and upon a rule observed *semper, ubique, et ab omnibus.* But, as already shown, the differing punishments inflicted by the councils, indicate a different estimate of the offences they forbade. And no one will deny that the Church at various times added, of its own authority, a number of restraints on marriage, which were not previously to be found in Leviticus, or any other part of Scripture. By the 17th and 18th of the Apostolic Canon, he who has been twice married after baptism, or who has married a widow, a divorced woman, a harlot, a servant-maid, or an actress, cannot be a bishop, a presbyter, or a deacon. A canon of Neo Cæsarea says;—"If any presbyter marry, let him be deprived of his orders." The council of Agde interdicted a clergyman who had been twice married, or who married a widow, from the exercise of his functions. And another Apostolic canon recommended married priests "*abstinere se a conjugibus suis et non liberos generare*:"—advice which the population tables would lead us to suppose is not now very generally followed, even by those who advocate the restriction on which we are

commenting. The Church of Rome has always been ready to multiply its prohibitions, but these have generally gone in enhancement of price, not in bar of bargain. In this matter of marriage, its restrictive provisions were extended till they reached the seventh degree of spiritual relationship (*i.e.* godfather and godson), and the trade in dispensations which arose out of this prohibitive code is well known to have been a very profitable branch of revenue with the successors of St. Peter. Yet Cardinal Wiseman has told us that the Church of which he was so distinguished an ornament only dispenses with what it regards as ecclesiastical, and not with moral prohibitions. It is true that the foreign universities, in Henry VIII's time, pronounced very strongly against these marriages. But every one knows that Oxford violated its statutes that it might declare in the King's favour, while the suffrages of the continental corporations were obtained by bribery the most unblushing. Bishop Parker's table of prohibited degrees was first put forward on that prelate's own authority. It was only impliedly, not expressly, incorporated with the canons of 1505, and as these canons themselves have never been ratified by Parliament, they are not, in strict law, binding upon the laity, but on the clergy only. Whatever binding force they possess, they derive from the decisions in *Johnson* v. *Burwell*, *Hill* v. *Good*, and the *Bishop of St. Davids* v. *Lucy*, which, having been followed in some later cases, may be held to have established the authority of the canons by judge-made law. But this very adoption contravenes the most important principle of international law—the *lex loci contractus*. The decision in *Brooke* v. *Brooke*, with all its consequent hardships, decides that a contract of marriage legally binding in the country where it was made, is of no avail against the positive enactments of Lord Lyndhurst's Act. It follows, therefore, that the Church has had given to her, in an indirect manner, the power of enforcing obedience to her reading of a doubtful passage, by the imposition of heavy civil penalties upon those who decline to accept her exposition. A very little further stretch of

this authority would include the case of foreigners resident here, after contracting such a marriage, in a manner valid according to their own law. And unquestionably our courts may, at any moment, have to decide the rights of some of our colonists, in opposition to the courts of at least one self-governed colony. About two years ago, the Canadian Court of Chancery pronounced in favour of a marriage of this description. Suppose the parties so married came to reside in this country, and acquired an English domicile. If the husband died intestate, his wife and children, by the decision in *Brooke* v. *Brooke*, would be mere strangers, who could derive no benefit whatever from the property he left behind him. If, on the other hand, he left a will, they would be mulcted in ten per cent. duty, while in either case his property in Canada would descend or be charged in the ordinary manner. We need hardly say that by keeping the law in its present state, we are preparing the way not only for those hard cases which make bad law, but for that sense of injustice which may breed bad blood between the mother country and her distant dependencies.

The law of 1835 is also open to the objection of having drawn an arbitrary line on a question of morals. If to marry a deceased wife's sister is a sin now, it was a sin before the law was passed. If it be *malum in se* now, it is in the last degree inconsistent to treat it as if it were only *malum prohibitum* then. Yet this is exactly what we have done. A marriage celebrated on August 30, 1835, is good and valid absolutely; the parties to it are, even in ecclesiastical eyes, entitled to all the privileges of good and sober citizens. But those who did precisely the same act only two days later, are to be looked upon as social pariahs, upon whom, (so far as legislation can do it), we fix the stigma of incestuous cohabitation and the material penalties of illicit copulation. Cases actually occurred in which parties acting in ignorance of the change in the Bill which took place at the last moment, found themselves excluded from its benefits. And to complete the

anomaly, the law which inflicts these cruel wrongs generally acts on an opposite principle. "Near of kin," in legal contemplation, imports consanguinity only. A sister-in-law, to marry whom it is forbidden because she is a near relative, is charged with the legacy duty payable by an utter stranger!

It is the fashion for the opponents of these marriages to enlarge upon their social inexpediency, and to present highly coloured pictures of the evil consequences that would inevitably follow if a wife thought it possible for her sister ever to take her place in her husband's household. We are told that the free and affectionate intercourse which now obtains between the husband and his wife's sisters, is attributable to the assurance which the law gives that neither of those sisters can ever become her rival; that when once the single sister is on the same footing (as to possible marriage), as any other woman, the intimacy engendered by relationship will make her more formidable than any one else, and that the result would be to reduce the warm and delightful exercise of family affection, to a mere formal interchange of ordinary courtesies, or to make all parties miserable by constant suspicions, jealousies, and heartburnings. It is said that these mischiefs would be especially felt at times when the single sister's help is most needed, and her presence most to be desired; and in proof of this we are referred to two cases of wife murder which occurred in 1850, through the husband's wish to get rid of his wife that he might marry her sister. And in one of the pamphlets issued by the Marriage Law Defence Association, a letter was published from a lady who had written to Sir Harry Inglis stating that if the law were altered, she would never again have a sister with her during a confinement.

We must own that we think this kind of argumentation reflects very little credit upon those who employ it. Did we not know that it is used by many persons of irreproachable character, we should suppose it was invented by some prurient sensation novelist, whose diseased imagination led him to indulge nasty thoughts concerning the most sacred and inti-

mate of domestic relations. It was on the ground of social inexpediency that the royal commissioners, in 1847, emphatically condemned the present law. And as to the revolting, though finely spun theories of the mischiefs which would follow the legalisation of such unions, we are tempted to ask whether human nature has changed since 1835? Until that year, these marriages, as we have shown, were practically permitted, without producing the mischiefs which we are now told are inseparable from them. Individual instances of lawless passion there undoubtedly may be, but it is a libel on humanity to regard them as indications of what the mass would do. As painted by these superlatively pure people, the married state is one in which the wife has to keep her husband's acquaintance with any woman whom he might, by possibility marry, under an espionage humiliating to him and painful to her. We leave it to them to reconcile these notions with any reasonable conception of manly virtue or womanly purity.

The test of experience, also, is conclusive in favour of the alteration which the adversaries of the present law desire. In spite of the severe and unreasonable penalties with which these marriages are visited, they are sufficiently common in every class of society, to justify the wife in entertaining the apprehensions which we are told she does not feel now, only because these marriages are forbidden by law. Yet we do not find that any one's peace of mind is seriously disturbed by these considerations. It is hinted that if these marriages were permitted, the husband and the single sister, whether singly or in concert, would be continually compassing the death of the wife, that they might marry as soon as she was out of the way. We admit that cases like this might occur, but they would occur only among wretches almost destitute of moral feeling, whose evil natures neither acts of parliament nor divine injunctions would be likely to restrain. The case of the two wife murders in 1850 proves this. Unfortunately for those who put such, faith in the restraining influence of Lord Lyndhurst's Act

these cases occurred fifteen years after that Act had passed, and they were committed with an eye to those marriages which the law has deprived of all validity. Indeed this argument needs only to be pressed a little further, to exclude every woman from a house who has not reached what may be called a safe standard of age or ugliness. If the wife's sister would be excluded, supposing it were possible for the husband to marry her, on the same principle every female cousin or friend ought not to be allowed within the house, save on the footing of a formal and distant acquaintance, The same objection will extend to blood-relations, for everyone has heard of incestuous crimes committed by parent and child, by brother and sister. And while we write, a man of education and position, a member of the medical profession in the commercial capital of Scotland, lies under sentence of death for murdering his wife in order that he might marry his maid-servant. We suppose no one will say that we should do without servants, or shut our doors against our female friends and relatives, because of these occasional enormities. Yet the arguments urged against legalising these marriages lead us to no other or less revolting conclusion.

And while experience falsifies the prohibitionists' prognostications of evil, it greatly confirms the abolitionists' expectations of good resulting from the abrogation of this restriction. There are few persons who do not know of instances within their own circle of acquaintance, in which moral, excellent, and religious members of society have contracted these unions. Cases like these are to be found in every rank of life, among the laity and clergy of every religious denomination. But most of all the removal of the prohibition is a poor man's question. In the words of Lord Denman:—

"A virtuous young man has had the irreparable misfortune of losing his wife, the mother of his children. Unequal to undertake the pilgrimage of chaste widowhood during all his remaining years on earth, he finds that he can at once gratify his natural feelings, and provide both the most agreeable companion for himself, and the

best guardian for his children, by a union with her who most resembles the object of his youthful affection, and who, from long acquaintance, cherishes the liveliest sentiments of respect and confidence for him, and now feels that she can return a tenderer attachment. The law imposes a veto, because the human lawgiver imagines evil consequences to society, which the Divine Lawgiver, who benignantly framed a code for the good of society, did not foresee. Can this law be vindicated by its own severe provisions? Is it enough to say to these parties—'You knew the law, and should have taken care not to form this mutual attachment? You should have looked elsewhere for an eligible matrimonial connection; there are men and women enough in the world to choose from.' I believe this has been said; but I hope by no bishop, I am sure not openly in his place in Parliament. There the law, though by many confessed to have had its origin in a mistake, is still defended and maintained for the happy but accidental effect ascribed to it, of preventing great moral and social evils."

While his lordship's remarks apply to these marriages in every class of society, they are especially true with respect to the condition of the poor. Many of the warmest advocates of the change among the clergy, admit that they became so through seeing how hardly the present law bears upon widowers in the lower ranks of life. Very often, on her deathbed, the wife has been known to express a desire that her sister should succeed her. Still more frequently, after her decease, there has seemed a moral obligation on the sister's part, compelling her to take charge of the orphan children. Under such circumstances attachment almost inevitably springs up, in spite of the law. That this is so, is shown by the fact that out of every 33 widowers who marry again, one contracts a marriage of this kind. In how many cases among the lower ranks of society the bar to legal marriage acts as an incentive to concubinage no one can tell. We are told that if marriages were possible, a single sister could never go to take charge of the children a deceased wife had left behind her, without giving cause for scandal. We answer that the law of itself

does not prevent scandal now. The scandal depends entirely on the age and circumstances of the parties. "The vision of an attractive girl of twenty protected by nothing but Lord Lyndhurst's Act, keeping house for a widowed brother-in-law of twenty-five, is but a vision after all." And if we are to make laws for the prevention of scandal, where shall we stop in the work of legislation? What library will contain statutes necessarily so very much "at large." And what will be the use of them when they are passed and published?

Briefly then, we may sum up our objections to the law of 1835. In the opinion of many theologians, it forbids what Moses has not forbidden, and it condemns those whom he has not condemned. It adopts and perpetuates a doctrine, which grew out of the asceticism of devotees and the grasping policy of ecclesiastics. It endorses with approval the pretended conscientious scruples of one of the worst kings that ever ruled this kingdom; the monarch "who never spared a man in his cruelty, or a woman in his lust." It recognises a restrictive canon imposed by the clergy upon the laity in a surreptitious manner, which only became incorporated with the Common Law, by a decision pronounced in the days of the second Charles; those days whose memory may well make lawyers blush and patriots weep. It deals with the ties of affinity and consanguinity in a manner at variance with the practice of the law in mere matters of revenue, and endeavours to filch character and social status from a multitude of virtuous persons, on grounds which would be insufficient to regulate the amount payable as legacy duty on a bequest of £20. It makes the lapse of a day the test by which to decide whether a marriage, contracted in good faith, and probably blessed by all the rites of the church, is an union "honourable to all," or an incestuous connexion, which ought to drive the parties to it from the pale of decent society. It does this, because in a particular session, circumstances arose which led the advocates of a just measure to postpone the claims of society, that they might secure the succession to a dukedom. And the law

is maintained in spite of the emphatic condemnation of the Royal Commissioners, the adverse votes of the House of Commons, the testimony of many of the best of our parochial clergy, and ministers of dissenting denominations, the general feeling and desire of the community. Among the upper and middle classes, it engenders dislike and contempt for an unreasonable restriction, while among the lower orders it tends to lower the moral tone, to necessitate concubinage, and to create a feeling of bitterness at a law which presses with peculiar hardships upon the poor. It is prolific in hard cases, and cruel in its pressure upon innocent persons. Its repeal is demanded by the interests of society, the happiness of families; against all these considerations the existing state of things is defended by those who, in the interests of domestic purity, actually put forward a representation of female character revolting in its depravity, shocking in its obscenity, and extreme almost to grotesqueness in its exaggeration. Surely it is time that a law which Scripture does not authorise, which primitive Christianity does not sanction, which Parliament unwillingly enacted, which, morality has not required, and experience has not approved, should be expunged from the Statute Book of a great, a free, and a justice-loving nation.

Notices of New Books.

[*** It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance require it.]

A Practical Treatise on the Succession Duty Act (16 & 17 Vict. c. 51), with the decisions thereon in England, Scotland, and Ireland. By William Brown, Esq., of Gray's Inn, Barrister-at-Law. London: H. Sweet.

By way of introduction to our brief review of this volume, we propose to make a few general historical remarks relative to the subject it embraces. There are two aspects in which we may view this Act of our Legislature; first, as a fiscal measure to increase the public revenue; secondly, as one of policy and justice. Landed estate, from the feudal relations with which it was surrounded, whatever burdens it might have borne in other directions, was exempt from any impost by the State (save that of stamp duty) on its transfer, disposition, or devolution. This freedom from taxation was upheld by the owners of the soil—the landed interest itself. When in 1796 Mr. Pitt introduced his Legacy Bill, and attempted to include in it landed estate as well as personal property, he was met with a determined opposition; and although he eventually carried his measure it was only by a majority of one vote, and that the casting vote of the Speaker. He therefore withdrew the Bill and relinquished his attempt, and did not again renew it. Objections were urged then, as against the present Bill; it was said that it would render the tenure of land insecure, and depreciate its value by the production of deeds which, from the power vested in the Commissioners, would be rendered necessary. That it was a tax upon capital—a tax imposed upon a particular class of individuals—that it would tend to excite disputes between landlord and tenant—and that it would affect posterity instead of those living. In the last stage of the Bill for its final third reading, the House divided—54 pro., 54 con. The Speaker said he would not by his vote preclude the House from again considering the Bill in question, and therefore declared himself with the "ayes." Mr. Pitt then informed the House that as he perceived so many gentlemen were unfriendly to the Bill, he would move next day to put it off for three months, which he accordingly did. Thus the measure was abandoned, and no attempt was made to impose a succession duty on land until Mr. Gladstone, as Chancellor of the Exchequer, introduced this Bill in 1853. It was opposed at every stage—several amendments were moved, chiefly by the landed

interest and its adherents. It was contended that the burden would be found intolerable to the country; that it would be found so oppressive and inquisitorial in its operation that not many years would elapse before the country would protest against it. This, however, was but the language of those whose property would now be subjected to an impost which it had heretofore escaped.* It must also be added, that this being a Government measure, it did not fail to meet with strenuous opposition from those opposed to the Treasury Bench; it was, however, eventually carried by 176 votes to 104.

It were difficult, even if desirable, to analyse in detail the contents of this volume; it mainly consists of discussions upon the disputed construction of the language of the Statute, and the intention of the Legislature in adopting such language. The ambiguity of many words in the Act, together with the desire to evade this novel tax, have prompted those numerous resorts to our courts, the results of which form the chief subject-matter of the volume before us. The Act has now been in operation twelve years, and it is to be hoped that the experience gained in that time, as shown by the cases given by Mr. Brown, will demonstrate pretty clearly the position in which successionists to property stand with respect to the claims of the Crown, and thus prevent fruitless litigation. It will also enable legal practitioners to advise those who consult them whether they should tacitly submit to the exaction, or with what prospect of success they may dispute the demands made upon them. This is a valuable consummation. The public and the profession are therefore much indebted to its author for the publication of this useful manual—we use the word manual advisedly, for the book is of that compact and convenient size that it comes strictly within that definition. It is to be regretted that the Act itself is not given *in extenso*, for although there is an analysis of it in the Appendix, still, whether from habit or a desire to resort to the fountain head, lawyers instinctively turn to an Act of Parliament itself rather than remain satisfied with another's interpretation, or any digest of it, however complete; and here we may remark, that the form of this volume differs from that in which Statutes have been generally reviewed. The several sections of the Act have been given, and the decisions arising upon them have followed, instead of the subject-matter taking precedence of the Act, the latter being made subservient to the former. In a treatise on the Act, as this is described to be, the form adopted is perhaps more logical and convenient; but that we leave to be determined by those who have occasion to consult it. In the preface we read, "The object of this Treatise is, and the endeavour in it has been, to give such a view of the Statute, and of the judicial expositions of it in England, Scotland, and Ireland, and in such a mode as the writer believes will tend to the better understanding and appreciation of it." We have said that the treatise is of that nature that it does not admit

* A living Ex-Chancellor has denounced this tax as the most vexatious burden ever laid upon property in England.

of critical analysis; it is, in fact, a compilation of cases arising under the Statute, with many useful and sound deductions, which evince the diligence and legal acumen of its author. We wish in conclusion to point to one useful chapter (the 5th), "On the rates of duties payable in respect of succession." It commences with a table from which may be learnt at a glance in what proportion lineal descendants, collateral, and strangers in blood are chargeable. This would seem simple enough, but the section of the Act on which this table is based "provides only for those cases of succession in which the predecessor and successor are different persons, and makes no provision for the case of a successor who derives his succession from himself, and is therefore his own predecessor;" hence, much litigation has arisen in explaining the meaning of the words, "his own predecessor;" we will quote the words of the Master of the Rolls, as given by Mr. Brown; "Considerable obscurity arises from the circumstance that 'predecessor,' according to the natural definition, means a person who has predeceased the successor; but the predecessor may be alive at the time when the succession falls in. As where a sum of money, to be raised and paid upon the death of A, is given to a stranger to settle upon the daughters of A, and the donee survives A, the money would be receivable and yet that stranger would be the predecessor who had settled the property upon the daughters of A." We would also particularly mention the chapter which treats "of the event upon which, and the time when the interest in the property, the subject of the disposition or devolution conferring the succession, is to arise," as well as the chapter which treats "of the nature of the interest in the property, the subject of the disposition or devolution creating or conferring the succession," also productive of much litigation. We here close our remarks. To the whole of the profession, but more especially to those who devote themselves to the consideration of settlements and other instruments affecting the transfer or disposition of real or personal estate, this manual will prove a valuable adviser.

A Treatise on the Law relating to Bankers and Banking, by James Grant, M. A., of the Middle Temple, Esq., Barrister-at-Law. Second Edition, by R. A. Fisher, Esq., of the Middle Temple, Barrister-at-Law. London: Butterworths, 7 Fleet Street. Dublin: Hodges & Smith, Grafton Street. 1865.

This is professedly a book of practice, intended chiefly for the guidance of professional lawyers. Several chapters throughout the work are, however, so thoroughly devoid of technical phraseology, as not only to be easily comprehended by, but highly instructive to the man of business. Considering the many arguable questions relating to the currency which are at present somewhat prominent before the public, we cannot too emphatically commend the good judgment of the editor in preserving the original treatise free and pure from speculative discussions. The insertion in the appendix of the Bank Notes Issue Bill of last Session, together with a state-

ment of reasons for the Bill, extending over some half a dozen pages, is the single departure from the strictly practical character of the work. It must be admitted that this measure was sufficiently conspicuous at the time Mr. Fisher's edition was in course of preparation to justify its insertion. The original purport of the author has been most rigidly carried out. The endeavour has been not to speculate how the law might be improved, not to lay down what it ought to be, but what it is, so that every one, whether concerned for a person carrying on business of banking solely, or in a common law partnership, whether a shareholder or a director in a banking copartnership, under statute 7 Geo. IV., c. 46, or in a joint stock company, under statute 7 & 8 Vict., c. 113, might find here the law, so far as it has hitherto been prescribed by statutory enactment, or developed, ascertained, and explained by judicial decisions, clearly, accurately, and usefully stated. With this view the plan has been followed of placing before the reader not merely statements of the dry points of law, all which were decided in the cases collected, but as a rule, a summary of the principal facts, and occasionally, of the arguments urged before the court, together with the main grounds upon which the judgments proceeded. We have been much struck with the clear and exhaustive comments of the author upon the powers and responsibilities of bank directors, and the remedies which the law gives to shareholders in cases of the bankruptcy or winding up of the company. In a treatise upon banking generally, it would have been quite out of place to enter minutely and specifically upon the law relating to the Bank of England. That would alone make up a tolerably bulky volume. It embraces hundreds of statutes—the titles of which, as the author tells, fill about two hundred pages of the statute book—all of a special character, referring to such matters as the management of Government loans, the issuing of exchequer bonds, and the control over the national debt. This treatise has been strictly confined to the every day business of banking throughout the country. The present editor has very much increased the value of the original work—a work whose sterling merits had already raised it to the rank of a standard text-book.

A Treatise on Arrangements with Creditors under the Bankruptcy Act, 1861, with Precedents; to which are added the Sections of the Bankruptcy Acts, 1849 and 1861, and Rules and Orders relating thereto. With a Full Index. By William Downes Griffith, of the Inner Temple, Esq., Barrister-at-Law. London: H. Sweet, Chancery Lane: Stevens, Sons, & Haynes, Bell Yard, Lincoln's Inn, 1865.

THERE was some humour and a good deal of truth in the statement of an eminent Queen's Counsel, who recently observed that several members of his profession were deriving a handsome income from

the 192nd section of Lord Westbury's Bankruptcy Act. This section has been, undoubtedly, most prolific of litigation, as the conflicting decisions of the judges of the Superior Courts of law and equity abundantly proves. Mr. Griffith's little volume is a digest of those cases, and we feel bound to say that the author has shown good judgment and comprehensiveness of information, in his elimination, from the decided cases, of those great principles upon which they mainly rest. Mr. Griffith does not embrace, in his treatment of the law relating to composition with creditors, any branch of the law of debtor and creditor which is not directly applicable to arrangements within the provisions of the Act of 1861.

Those provisions prescribe three distinct ways of coming to terms with creditors, each of which is ably commented upon by the author. These three have points of similarity, while two are hardly distinguishable. The first relates to arrangements which might be made after actual adjudication of bankruptcy, and is described in section 110. If this course be adopted, the bankrupt and his creditors are left almost entirely independent of any interference on the part of the Court. No deed or instrument is required, and no discretion is left to the court to stay the bankruptcy. Provided the majority in value of the creditors present at any meeting shall resolve to stay the proceedings in bankruptcy, it is competent for the majority in number representing three-fourths in value (after having received fourteen days' notice of the resolution passed at the first meeting) to suspend the bankruptcy proceedings, and to direct the counting up of the estate whereupon the bankrupt is entitled to his discharge. It would appear that this course, although so simple on the face of it, is not frequently adopted; partly because the procedure for winding up the estate is very vaguely indicated, and partly because there is so much uncertainty as to the effect of the suspension of the bankruptcy upon the jurisdiction of the court. The author cites cases to show that where proceedings had been stayed pursuant to resolution under this section, the court had no power to hear questions between assignees and creditors, and deduces from the decisions this general proposition, that such a resolution, adopted by the requisite number, amounts to a *stet processus.*

With no less analytical skill does Mr. Griffith sift the cases which have arisen out of the 185th section and the following contextual sections. This differs from the above in the following particulars. First, it requires a deed; secondly, the court has a discretion as to allowing the bankruptcy or not; and, thirdly, it does not require any adjournment of the first meeting for the purpose of reconsidering the resolution to wind up. Under this clause three-fourths in number and value of the creditors present at a properly constituted meeting may resolve that a state shall be wound up under a deed of arrangement, composition, or otherwise, and direct an application to be made to the court to stay proceedings. The power of the court to interfere is also much larger in this case. It may inquire whether the resolution has been properly carried, that its terms are reasonable and calculated to benefit the general body of creditors

under the estate, and to give such directions as to the interim management of the effects as it shall deem expedient. From a number of decisions cited in this work upon the subject of "reasonableness" of the terms of arrangement, the author concludes that the broad general principle guiding and running through all the decisions is this—the court must be satisfied that the arrangement is such as ought to be enforced on a dissentient minority.

But all the difficulties and ambiguities of this Act culminate in the 192nd section. And to this section Mr. Griffith has devoted much care and labour. He enumerates the following as among the few points under this section that might be considered to be well settled law. In the first place, the assignment of all the debtor's property is not necessary to the validity of a deed, within this section; nor, indeed, is any assignment of property absolutely necessary, though this was for some time considered very doubtful. It is also now settled that not only must all the creditors be objects of the benefits provided by the deed, but they must be equally so. Any irregularity, at least if it be an essential provision, makes the deed void. Mr. Griffith cites authority in which it was expressly held that a secret contract with a creditor—to induce him to assent—that he should have a larger dividend than others, even though the dividend was to be paid by a person other than the debtor, was a fraud upon the general body of creditors, and therefore sufficient to make the deed nugatory. So much for what is clear law, and now we come to the wide range of doubt and conjecture. The effect of deeds of composition upon non-assenting creditors, the status of creditors holding securities as compared with the status of unsecured creditors, and the manner in which the consent of creditors is to be reckoned, in order to ascertain the requisite majority, are the principal and most vexed questions under the 192nd section. Mr. Griffith has collected the principal cases on the above points—*in re* Shettle; *ex parte* Morgan; *ex parte* Cockburn, &c.—and has made a creditable effort to reconcile the decisions, and deduce from them some fixed rules. The following statement of Mr. Griffith's conclusions after comparing the cases, awakens a somewhat painful feeling as to the present position of the law regarding secured and unsecured creditors. "The only way," observes the author, "in which the cases can stand together, is by requiring the assent of such a majority of unsecured creditors as will amount to three-fourths in value of the creditors unsecured, and the further consent of as many creditors, whether secured or not, as will make the whole number of assents up to the required majority of all the creditors, including the secured as well as the unsecured (by unsecured in the foregoing clause is meant to be included creditors only partially secured, so far as concerns the unsecured balance of the debt) but as no means are provided for estimating the value of the security, at least prior to the registration of the deed, it will not, considering these authorities, be safe to rely on any deed for the validity of which the amount given by any secured creditor is requisite, unless after allowing the very maximum value which his security can possibly be worth, and

estimating his assent for the balance only of his debt after deducting such maximum value." p. 34.

Digest of House of Lords Cases decided on Appeal from Scotland, 1709 to 1864, with Glossary of Scottish Law Terms. By John Boyd Kinnear, Advocate, and of Lincoln's Inn, Barrister-at-law; author of a "A Practical Treatise on the Law of Bankruptcy," &c. Edinburgh: Bell & Bradfute, 12 Bank Street. London: William Maxwell. 1865.

THE distinction between a Digest and a Report of Judicial decisions, has been consistently maintained throughout this volume. Succintness, brevity, and method, are the very essence of a good Digest, while the principal requirements in a good Report are accuracy in recording the exact enunciation of the law, discrimination in the analysis of arguments, and sufficient knowledge of the law to present its authoritative exposition in a clear and exhaustive form. As Mr. Kinnear justly observes, a "Digest is a work of reference, and not of authority." (Preface, p. 4.) Hence the reader's attention is directed in this work to the sources of law, and to that which by analogy or inference might aid in elucidating the law, rather than to a statement of the law which should be taken as exhaustive and complete.

In these days of easy and lazy authorship, it is only fair to give to a hard and honest worker the full honours to which he is entitled. We have much pleasure, therefore, in transcribing the paragraph following:—

"In preparing the abstracts, I have in no instance relied on those given by the original reporters, many of which are well known to be very imperfect, and some absolutely erroneous. I have read through every report of each case, in both the English and Scottish series, besides often referring to the appeal cases, a labour of which the amount may be conceived from the fact that there are 1,970 separate cases digested, different reports of very many of which are found in the various series. But as each case commonly contains more than one point of law or practice, the digest embraces upwards of 2,500 distinct abstracts, and by means of cross references, furnishes direction to nearly 3,000 points of law, determined or considered. I cannot but trust that the bringing these into one view will be of service to the profession, even while fully conscious that I may not hope to have performed the task in a manner exempt from error."

The reader may form a general idea of the plan of the work from the following sketch. In the first place the subjects are arranged alphabetically, the first fifty pages, for example, containing chapters upon "acquiescence," "action," "adjudication," "admiralty," "alien," "aliment of heir," "appeal," "arbitration," and "arrestment;" while the closing pages of the Digest bear the titles of "trust," "usury," "valuation," and "will." Each of these subjects stands at

the head of a distinct chapter, and the chapter is subdivided at greater or less length into sections, which read like the marginal notes of the English reports. These propositions are very clearly stated, and cannot fail to conduct the inquirer to the fountains of the law. As the Digest was intended for English barristers practising in the House of Lords, as well as for the Scotch advocates, the author was driven to a very embarrassing choice; whether on the one hand to Anglicise the terms and phrases of Scotch law, omitting them from the text altogether, or to incorporate the technicalities of Scotch law in the body of the work, and to supplement the same with a glossary. In giving the preference to the latter course, we think Mr. Kinnear has shown much wisdom. The obvious consequence of attempting to select from the English vocabulary words synonymous with the unfamiliar terms of the Scotch law, would be that neither the English nor the Scotch lawyer would be made thoroughly conversant with the subject. The author would have failed to convey to the Scotch lawyer the full information which the word familiar to him would have implied; while it would have misled the English lawyer by inducing him to suppose that the law is identical, when it is only similar, and that no distinctions exist, when the distinctions may happen to be material. For all practical purposes the glossary will afford sufficient guidance to the English reader, in the interpolation of these technical terms, which, however uncouth and pedantic to the English ear, are for the most part full of expression and well derived.

A Treatise on the Practice of Conveyancing. By William Whittaker Barry, of Lincoln's-Inn, Barrister-at-Law, late holder of the Studentship of the Inns of Court: and Author of "A Treatise on the Statutory Jurisdiction of the Court of Chancery." London: Butterworth, 7 Fleet Street, 1865.

It is scarcely to be expected that the venerable conveyancer of many years' standing is as yet prepared to break with the past, and to sanction the bold heresies of the registration and the indefeasibility of title. One thing we must, however, require him to admit, namely, that the transfer of landed property, and the investigation of title, under the present practice is a wearisome and expensive work, not at all adapted to the requirements of the age. We must ask him to admit that landed property is the most cumbrous and perplexing commodity that can be brought to the market, that it acquires a high artificial value, not so much on account of its limited extent, as on account of the extravagant cost involved in the repeated investigations of title. Few will deny that the profession is very far from fully appreciating the beneficial objects and the thoroughly practical character of Lord Westbury's Land Transfer Act. This question must be, and can be, treated only on broad principles. If it is

possible, as it has been alleged, to secure a good title for one-tenth of the labour and money incurred under the old system, there ought to be only one opinion upon the new Act. But then some members of the profession continue to urge—it is manifest that we must be ruined if nine-tenths of the conveyancing business in landed estate is taken from us; we had better shut up at once. This is the greatest possible mistake. The immediate effect of a hearty and general adoption of the new system would be to facilitate the transfer of landed estate, and thereby to increase the business of conveyancing ten, twenty, or even thirty-fold. Can there be any doubt that if the scheme were fairly brought before the public, with the full, sincere, and unequivocal sanction of the profession, that its adoption would be universal? If this were done, all the practitioners of England and Wales, if they would work ever so hard, would be unable, for the next quarter of a century, to master the task of procuring titles to all owners of landed estate. The system of registering the title and making it indefeasible has succeeded admirably in many countries. In several continental states every piece of land is duly registered, and the following is a general outline of the mode in which the plan is carried out. A is the owner of a house bought, let us say, for £2,000. He has already a first mortgage of £800, and requires another loan of £300. B, the lender, gets an authority from A to inspect the register, and for a mere nominal fee of a few pence he finds A to be the registered owner. He also finds the first mortgage, but no further incumbrance, and he is satisfied. Having thus, without the aid of a lawyer, investigated the title, he repairs with the owner to a conveyancer, by whom the deed is drawn. The conveyancer sends the deed, with an attested copy, to the Registration-office, where the substance of the deed is copied into the register. After making a short minute on the original deed it is returned to the party mentioned in the deed as entitled to its possession. The registration office as well as the conveyancer are to charge only lump sums regulated according to a scale based on the value of the property or the amount of the loan. All this may be fairly completed within the space of eight days. It is evident that when once the title has been registered the far greater amount of conveyancing business will be reduced to nearly mechanical forms.

The author of this valuable treatise on conveyancing, has most wisely devoted a considerable part of his work to a practical illustration of the working of the recent Statutes on Registration of Title. In fact, while the other branches of conveyancing treated of have no pretension to systematical completeness, the whole law and practice as regards the registration and indefeasibility of title have been fully brought before the reader; and for this, as well as for other reasons, we feel bound to strongly recommend it to the practitioner as well as to the student. At the same time we cannot help observing that the practitioner may find in the details of the new practice of conveyancing, so clearly set forth by the author in the present publication, some grounds for criticism upon the complicated working of the system. It is perfectly true that still much is left

to official arbitrium; for instance, all the formalities required to fix the boundaries of an estate. The leading principle of the legislator evidently was carefully to fix the boundaries of each estate. We cannot help thinking that experience will lead to another method. In countries where the system of registration has been completely carried out, the principle of fixing the boundaries in detail has been given up. In truth, boundaries cannot absolutely be fixed in this manner, *i. e.*, to the preclusion of any further dispute or claim.

It is a well-known fact that it has been a point of the greatest difficulty with legislators to introduce a practical efficient method of establishing the first title to an estate for the registration; but the title once registered will at once enhance the value of the estate by 20 to 40 per cent., through the facility of transfer, dismemberment, and the new credit opened up to its owner.

The author has very properly abstained from any critical observations, for in fact there are not yet sufficient data collected which at present will justify any safe conclusion. A return has been recently published, from which it appears that during the period of two years up to the 10th of June, 1865, only thirty-four estates had been actually registered under the Transfer of Land Act of 1862.

These comprised estates whose aggregate value amounted to £375,850; 223 cases were then still pending, and in various stages of progress. This clearly shows that the profession is still very far from a true appreciation of the value and importance of the new system. It entirely rests with the profession to give the full benefit of the new laws to the public and to themselves.

More applications for the registration and transfer of titles are made in one year in any German town which has any pretension to importance, than are made in all England in twice that period.

Mr. Barry offers to the profession in the present volume a well-arranged series of articles on the practice of conveyancing, in sixteen chapters. They embrace the following subjects:—abstract of titles, agreements, particulars and conditions of sale, copyholds, covenants, creditors' deeds and arrangements, preparation of deeds, evidence, lease, mortgages, partnership' deeds, sales and purchases, settlements, wills, and two entirely new chapters on land registry and Declaration of Title Act. From this enumeration it will be seen that the author does not undertake to supply a complete digest of the practice of conveyancing, nor is it perfectly clear upon what principle the author proceeded in treating the subject of conveyancing, in the order above enumerated. We, therefore, can accept this text book only as an instalment of what it is intended the profession should have and want to have, namely, a complete systematical digest of the modern practice of conveyancing. The rich mine of the author's extensive practical experience is only partly opened up in the present volume, but from what is given, we are only doing justice to the author in calling on him to come forward with a complete system worked out on the principles here laid down. The author has proved himself to be a master of the subject, for he not

only gives a most valuable supply of practical suggestions, but criticises them with much ability, and we have no doubt that his criticism will meet with general approval.

Mr. Barry properly animadverts upon the absence of punctuation in legal instruments. There can be no doubt that this is a highly objectionable practice, and we think that every sound conveyancer will consider it an improvement if proper punctuation in the framing of sentences be introduced. We find this improvement in all strictly commercial instruments for the simple reason that the parties interested look more closely into the legal documents which bind them, than leaseholders, copyholders, or freeholders are in the habit of doing.

The last person whom one could expect to find introduced in a practice of conveyancing would probably be Bishop Colenso, and we feel bound to say that Mr. Barry has been particularly unfortunate in his uncalled-for allusions to the present phase of theological polemics in this country. We trust Mr. Barry will eschew all religious controversy in the future editions of his book, as utterly foreign to a work on English practice of conveyancing.

Tabulæ Curiales: or Tables of the Superior Courts of Westminster Hall; showing the Judges who sat in them from 1066 to 1864, with the Attorney- and Solicitor-Generals of each Reign from the Institution of those Offices, to which is prefixed an Alphabetical List of all the Judges during the same period; distinguishing the Reigns in which they flourished, and the Courts in which they sat. By Edward Foss, F.S.A., of the Inner Temple, author of the "Judges of England." London: John Murray, Albemarle Street. 1865.

Mr. Foss is an author well known to the legal profession for his special erudition. His researches into what may be called the Archæology of the Bench and the Bar, have been conducted with no less zeal than ability. The "Tabulæ Curiales" furnishes ample proof of careful and laborious reading; and its pages may with perfect confidence be consulted by the student of legal history for information which he cannot find in any other work so methodically and compendiously arranged. The book commences with an alphabetical list of all the equity and common-law judges, from the time of the Conquest to the present date; with the reigns in which they flourished and the different courts in which they at any time sat. To compile this chronological list must have cost the author a great amount of labour. But the most useful portion of the work (and upon this the author appears to have bestowed special attention) is that which contains the tables of the superior courts in each successive reign, with their respective staffs during every year of its continuance. Thus the reader has presented to him at one glance

the precise position of each judge in the several reigns. From the reign of Edward I. this chronological outline of the judges is brought down in unbroken succession. Previous to this reign the jurisdiction of the Courts of Kings Bench, Common Pleas, and Exchequer, being undivided, the judges of that period are simply entered on the judicial roll as "Justiciers."

The History and Uses of the Law of Entail and Settlement. By Charles Neate, M.P., Barrister-at-Law. London: Ridgway.

In this pamphlet Mr. Neate endeavours to establish two propositions: first, that the Law of Entail is not so much a remnant of feudal fetters as an abridgment of feudal liberty; secondly, that that law is productive of serious evil, by inducing dissensions between the present and the prospective owners of entailed estates, by increasing the monopoly of landed property among the rich, and by reducing the influence and independence of the agricultural classes. The remedy he proposes is, to take away altogether the power of settling land, and to confine that power, under restriction, to personal property.

Mr. Neate deals with his subject far too briefly to do justice to his views. He does not follow the remedy suggested into its details and probable consequences. He advances no plan by which, without violating the soundest rules of law, personal property —money, for example—could be made the subject of entail. Nor, on the other hand, does he point out any method by which settlements could be abolished without wholly abolishing the power of creating remainders. *Primâ facie*, it seems that the one must, to answer the end in view, involve the other. It is not clear to us that the evils to which Mr. Neate calls attention would not result as much from a limitation every few years to the father immediately for life, and to the eldest son by way of remainder in fee simple, as from the modes of settlement at present employed. The real cause of the evils in question appears to be, not so much any defect in the law, as that traditionary avarice of landed property which characterises the aristocracy and gentry of England, resulting from the desire to gratify family pride, and to increase family influence. It is not easy to see how, by any wise regulative interference, land is to be kept out of the hands of people who are determined to buy it at any price; nor in which way land, once in their hands, is to be wrested from them. And yet both of those difficulties must be met if the evils they entail are to be removed. The power of settling land must, it seems to us, always exist in some form or other, and if this is so, Mr. Neate's plan, if wrought out into a practicable form, would apparently only increase the frequency and the intricacy of settlements.

These are the objections which suggest themselves at first sight. Mr. Neate may perhaps be able to meet them, and we shall be glad to weigh whatever he may say on a subject of so much importance.

The following Books have been received.

Trial by Jury; the Birthright of the People of England. London: Robert Hardwicke. 1865.

The St. Albans' Raid; or Investigations into the Charges against Trent, Bennett, H. Young, and command for their acts at St. Albans' Ut., on October 19, 1864. Being a complete and authentic report of all the proceedings on the demand of the United States for their Extradition, under the Ashburton Treaty. Before Judge Cowrsol, J. S. P., and the Hon. Mr. Justice Smith, J. S. C., with the arguments of counsel and the opinion of the judges revised by themselves. Compiled by L. N. Benjamin, B. C. L., Montreal. Printed by John Lovell, St. Nicholas Street. 1865.

Principles of Equity Drafting; with an Appendix of Forms. By Herbert Lewis, B.A., of the Middle Temple, Esq., Barrister-at-Law. Author of "Principles of Conveyancing, Explained and Illustrated." London: Butterworths, 7 Fleet Street. Dublin: Hodges, Smith, & Co., Grafton Street. 1865.

Lush's Practice of the Superior Courts of Law at Westminster, in Actions and Proceedings over which they have a Common Jurisdiction; with Introductory Treatises, respecting Parties to Action; Attornies and Town Agents; their Qualifications, Rights, Duties, Privileges, and Disabilities; the Mode of Suing, whether in Person or by Attorney, *In Forma Pauperis*, &c.; and an Appendix containing the authorised Tables of Costs and Fees, Forms of Proceeding, and Writs of Execution. Third Edition. By Joseph Dixon, of Lincoln's Inn, Barrister-at-Law. In Two Volumes. London: Butterworths, 7 Fleet Street. Dublin: Hodges & Smith, Grafton Street. 1865.

The Privilege of Religious Confession in English Courts of Justice, considered in a Letter to a Friend. By Edward Badely, Esq., M.A., Barrister-at-Law. London: Butterworth, 7 Fleet Street. Dublin: Hodges & Smith, Grafton Street. 1865.

Reports of Cases argued and determined during the year 1864, in the High Court of Judicature, at Fort William in Bengal, in its ordinary original Jurisdiction, and an appeal therefrom. With Tables of the names of the cases argued and the principal matters. By Edgar Hyde, M.A., of the Inner Temple, Esq., Barrister-at-Law, and Fellow of Corpus Christi College, Oxford. Calcutta: Messrs. Thacker, Spink, & Co. 1865.

Events of the Quarter.

THE EDMUNDS SCANDAL.

In our last number we stated that upon the highest and best authority, the unsullied reputation of Lord Brougham in this matter would not suffer in the slightest degree, and that the Report of the Select Committee appointed to inquire into all the circumstances connected with the resignation by Mr. Edmunds of the office of Clerk of the Patents, &c., would completely exculpate his lordship from the charges and imputations which have been more or less directly preferred against him. Since these observations were made, the affidavit of Lord Brougham and the Report of the Committee have been made public, and fully verify the truth of our assertion.

The following is a copy of Lord Brougham's affidavit received by the Committee :—

"In the matter of the inquiry into the circumstances of the resignation by Mr. Edmunds of certain offices and of the pension granted to him by the House of Lords.

"I, Henry, Lord Brougham and Vaux, make oath and say that when I made my affidavit in the above matter, on the 27th of March last, I knew nothing of the specific charges made against me or against any member of my family by the said Edmunds, nor did I know that the Committee appointed to investigate the above matters intended to pursue their inquiries beyond the circumstances of the said Edmunds's original appointment as Clerk of the Patents, and to travel into the private concerns of my family, and among others into the circumstances of a mortgage debt alleged to have been incurred by me in 1811, more than half a century ago. Now I make oath and say, that I made over the premises so mortgaged, and which are known by the name of the Howes Farm, which forms no part of the Brougham estate, to my late brother, James Brougham, in the year 1810. That from that time no part of the rents has ever been received by me or by any person on my account or for my benefit. That my said brother James was put into possession of the said premises in 1810, and continued to be sole beneficial owner thereof until his death in December, 1833. That from his death until the present time the whole rents of the said premises have by my direction been applied towards the payment of his debts and liabilities. That the money borrowed in 1811 on the security of the said premises was borrowed by my said brother James solely for his own use, and was wholly received and wholly enjoyed by him. That the legal estate in the said premises being still in me, I was a necessary party to the said mortgage deed, which I executed in 1811, and which I have never seen

from that day to this, nor heard of till October last. That I had been informed there was some transfer of the said mortgage in 1827, but I say that I was never told of any such transaction at the time, that I never received nor dealt with any part of the money, and that I never executed any such transfer. And I further say that no claim has ever been made to my knowledge for interest upon any such debt, and that I did not know and did not believe that at the time of my said brother's death in 1833 such mortgage still existed, and therefore that I, from my brother's death until the present time, directed all the rents of the said premises to be applied in relief of different liabilities affecting my said brother's estates. That the first time I heard of any claim was in a letter from James Leman, solicitor of the said Edmunds, sometime in October last, in which he stated that the said Edmunds' funds were exhausted, and that he had nothing left but a mortgage "upon the Brougham property," or words to that effect. And I further say that, well knowing there was no such mortgage upon the Brougham property, I directed my brother William Brougham to write to the said Leman that "I knew of no such debt, and that I owed no such sum." That late in the same month of October the mortgage deed of 1811 upon the said Howes Farm was found, as I have been informed, in the muniment room at Brougham; but I was not there, and I never saw, and never since have seen, the said deed. And I further say that after I had left England I was informed that the question of the validity of the said mortgage was to be referred to Lord Cranworth. And I further say I have been informed and believe, that the said Edmunds had stated upon oath that I was kept in ignorance of such reference. Now, I say that such statement is absolutely false, for I was not only informed of such intended reference at the time, but I afterwards sent to the said Lord Cranworth, in December last, from Cannes, a paper signed by me, in which I stated that I submitted in all respects to his arbitration and award. And I further say that acting under the firm conviction and belief that I owed no such debt, and that the claim so made against me by the said Leman on behalf of the said Edmunds in respect of a debt of £5,000 alleged to be secured on the Brougham property was, as regarded me, an unjust claim, I directed my said brother William to resist and oppose the same by every means in his power, and to urge upon the said Lord Cranworth that, inasmuch as no interest had ever been demanded of or paid by me, or by my order, or with my knowledge, privity, or consent, in respect of any such debt, that such liability, if it ever existed, ought not now to be pressed against me, and I believe that my said brother did accordingly resist such claim on my behalf. And I further say that if, as I have been informed and believe, my said brother ever offered to take upon himself such debt, such offer was purely voluntary on his part, and, having been made without my knowledge or consent, could in no way render me liable for any such debt. And I further say that the said premises are now liable to the claims of certain creditors of my said brother James to an amount largely exceeding the value thereof,

so that if said claim for £5,000 were extinguished by the money which I am informed and believe is secured on the said Edmunds's death by a policy for £3,000, or in any other manner, the said premises would become at once available to satisfy the claims of the said creditors, but would confer no benefit upon me, or upon any member of my family. And I further say that neither I nor any existing member of my family have ever been benefited, or ever can, under any possible circumstances, benefit, by any payments that have ever been made by the said Edmunds, in respect of the said debt, or otherwise. And I further say, I have been informed and believe that the said Edmunds has stated upon oath that Alfred Montgomery, a Commissioner of the Board of Inland Revenue, told him that I had said to him, the said Montgomery, that I had given him, the said Edmunds, the said Patent Office, on the understanding that the proceeds were to be applied for the benefit of his brothers and sisters. Now, I say that such statement, whether made by the said Edmunds or by the said Montgomery, is false; for I say that I did not give the said Edmunds the said Patent Office upon the understanding that it was to be for the benefit of his brothers and sisters, or upon or coupled with that or with any other condition or understanding whatever; and I further say that I never said either to the said Montgomery, or to any other person, that I had so given the said office, and I say that such statement is altogether untrue, whether made by the said Montgomery—but which I entirely disbelieve—or invented by the said Edmunds. And I further say, that when the said Patent Office became vacant, by the death of William Henry Scott, I had full power and absolute right to have given it to any member of my own family, as Lord Northington and as Lord Eldon had done, the former to his daughter in her marriage settlement, the latter to his son, William Henry Scott; and that if I had followed the example of my predecessors in office some member of my family would have enjoyed for his life a sinecure of nearly £4,000 a year; but, so far from having the desire to unduly enrich my family at the expense of the public, I voluntarily abolished the said sinecure, replacing it by the said office of £400 a year, which I gave to the said Edmunds. And lastly, I say, that from November, 1830, to November, 1834, the said Edmunds enjoyed by my gift the two offices of Pursebearer and Secretary to the Commissioners of the Peace, and that such offices, while I held the Great Seal, were paid by fees, and averaged together a sum exceeding £1,100 a year, although they were afterwards, as I believe in Lord Cottenham's time, reduced in amount and paid by fixed annual sums. And I further say, that when the said Edmunds lost the said offices by the change of Government in 1834, I had obtained for him from Lord Melbourne the Clerkship of the Crown, at that time £600, but afterwards raised to £1,000 a year, and which office in 1848 he (the said Edmunds) exchanged for the Clerkship in the House of Lords, the salary of which was £1,500 a year; and that he thereby gained £500, and not £300 a year, as I am informed he has sworn before the Committee. And I further say, that shortly afterwards the said

Edmunds obtained an additional £600 a year as Clerk to the Commissioner of Patents, and that he added to his already large income a further sum of not less than £300 a year from discounts upon patent stamps.

"Sworn this 22nd day of April, 1865, before the British Vice-Consul at Cannes in France, BROUGHAM and VAUX.

(Consular Seal.)

"These are to certify that the foregoing is the true and genuine signature of the Right Hon. Lord Brougham.

"Cannes, the 22nd day of April, 1865.

AUGT. BORNIOL,
Her Britannic Majesty's Vice-Consul for Cannes.

(Notarial Seal.)

"Je certifie que le sceau apposé d'autre part est le vrai sceau de M. le Vice-Consul de sa Majesté Britannique à Cannes.

"Cannes, le 22 Avril, 1865.

BORNIOL, Notaire Public à Cannes."

The Committee shaped the case into four charges, first, "For having between August 23, 1853, and the present time, in concert and in combination with one Thomas Ruscoe, improperly caused to be obtained and applied partly to his own use, and partly to the use of the said Thomas Ruscoe, allowances of discounts to a large amount upon the prices of the stamps purchased from Her Majesty's Stamp Office, for use in Her Majesty's Patent Office, such stamps having been purchased with public moneys; for which he, or the said Thomas Ruscoe to his knowledge, was accountable to Her Majesty." In considering this charge, the Committee thought it necessary to distinguish that part of it which depended upon the mere fact of taking the discounts, from that which related to the alleged application by Mr. Edmunds of public money to this purpose. The Committee were of opinion that the latter portion of the charge was fully established by evidence.

The second charge preferred against Mr. Edmunds was "For having improperly retained in his hands, or under his control, between the 9th of August, 1852, and the month of July, 1864, without duly paying the same over into Her Majesty's Exchequer, divers large sums of money received by him for fees on patents, which ought to have been from time to time during that period paid by him into Her Majesty's Exchequer." This charge the Committee believed to be fully proved.

The third charge was "For having from time to time improperly caused to be transferred to the credit of his private account with Messrs. Coutts & Co., bankers, from a separate account kept by him with the same bankers for the public purposes of Her Majesty's Patent Office, and having applied to his own use divers sums of public money, for which he was accountable to Her Majesty." On the facts in support of this charge the Committee had no hesitation in coming to the conclusion that it was completely established.

The fourth and last charge, "For having improperly retained in

his hands, until some time after the same had been made the subject of inquiry by Her Majesty's Commissioners of Patents, a sum of £399 7*s.* 4*d.*—part of a sum of £749 7*s.* 4*d.*, paid by or on behalf of one J. S. Smith, a clerk lately employed in Her Majesty's Patent Office for the purpose of making good public moneys in the said Patent Office, which had been by the said J. S. Smith improperly applied to his own use." The Committee gave Mr. Edmunds credit for the truth of his statement that he had forgotten the sum, and considered that the charge had not been substantiated.

Respecting the part taken in this affair by the Lord Chancellor, the following statement made by him, and the opinion of the Committee thereon, will suffice to show how Mr. Edmunds obtained a pension on his resignation of the office of reading clerk and clerk of committees in the House of Lords.

The Lord Chancellor stated to the Committee of the House of Lords that after the tender of Mr. Edmunds's resignation, it was no longer his intention to lay the papers on the table, and that they would not have been laid before the House if public attention had not been drawn to the subject out of doors; and his lordship added, "I beg the Committee for a moment to understand that, from the beginning to the end, I have acted upon this principle, that I would do nothing against Mr. Edmunds but what public duty required. I asked Lord Cranworth and Lord Kingsdown whether my duty required his discharge if the alleged facts were true; they said 'Yes.' Then I directed the inquiry to go on. When I found that the House of Lords was the tribunal, I asked the Cabinet, 'Is it my duty to bring it before the House of Lords?' Not whether I was justified in doing it, but, 'Is it my bounden duty to do it?' They said 'Yes.' But that was only in order that the House of Lords might no longer have that officer; and when that officer retired, I then determined for myself, rightly or wrongly (I take all the responsibility of it), that I would not interfere actively to prevent his having a pension."

To this the Committee say in their report that they "cannot coincide with the Lord Chancellor in the view thus taken by him of his public duty. In their opinion, it was incumbent on him who presented the petition of Mr. Edmunds to the House of Lords, in some manner to have apprised the Parliament Office Committee of the circumstances under which the resignation by Mr. Edmunds of the clerkship had taken place, and with which the Lord Chancellor was officially acquainted, and not to have left them to decide the question of a pension, with no clearer light than that which could be derived from vague and uncertain rumours. The Committee have, however, no reason to believe that the Lord Chancellor was influenced by any unworthy or unbecoming motives in thus abstaining from giving any information to the Committee. The Committee have examined the Chairman of Committees as to the knowledge by the members of the Select Committee which he attended, of any circumstances which might disentitle Mr. Edmunds to a pension. He stated that there was "a general knowledge or a general impression on the part of most of the members of the Committee, that in consequence of

certain pecuniary transactions in which Mr. Edmunds had been concerned in the Patent Office, he had resigned his appointment in it; but," he added, "the petition was presented to the House without observation, and no order was made directing the Committee to inquire into it. We had only the facts stated in the petition which was referred to us, and upon those facts we had to inquire what pension Mr. Edmunds should be considered entitled to. It is to be regretted that the Committee did not consider it to be their duty under the circumstances to act upon their general knowledge or impression, so far as to interpose some delay before the question was finally disposed of in favour of a pension, which, had the circumstances been fully known to them, would probably not have been recommended."

Before closing their Report, the Committee thought themselves bound to advert to the subject of the statement by Mr. Edmunds, that his salary as clerk of the Patents was "saddled with the payment of £300 a year to a certain trust, *i. e.* interest on a mortgage of an estate in Cumberland by Lord Brougham in 1811 for £5,000, and assigned in 1821 to trustees, of whom Mr. Edmunds was one, unknown to Lord Brougham." Lord St. Leonards, in his award as to the mortgage, printed in our last number, though deciding that Lord Brougham was liable in respect of the mortgage debt, yet believed that Lord Brougham did not receive any part of the money, and had entirely forgotten that the mortgage existed. All the witnesses concur in stating that these transactions took place without the slightest knowledge of them on the part of Lord Brougham, and that he was no party to any arrangement for the appropriation of any part of Mr. Edmunds's salary.

The Committee also in conclusion, trusted, "that they may without departing from their proper functions, be permitted to express their gratification that the result of their inquiry should have been to remove the possibility of any suspicion attaching to the character of so distinguished a member of their lordships' House."

THE LEEDS BANKRUPTCY COURT INQUIRY.

Unfortunately for the Lord Chancellor, his troubles in the Edmunds' case were followed by others of a far more serious kind, involving an investigation into the motives by which certain changes had been made in the official staff of the Leeds Bankruptcy Court, reports of a very questionable nature having got abroad respecting certain negotiations in connection therewith. On the 23rd of May, Mr. Ferrand moved in the House of Commons, "that a Select Committee be appointed to inquire into all the circumstances connected with the resignation of Mr. Henry Sedgwick Wilde as Registrar of the Court of Bankruptcy at Leeds; the granting him a pension, the appointment of Mr. Welch to the office, and fourthly, the suggestion that Mr. Welch was to resign that office in favour of the Hon. Richard Bethell, and receive another appointment in London."

In regard to the first subject of their inquiry—the circumstances

of Mr. Wilde's resignation of the office of Registrar in the District Court of Leeds—the Committee report:—

"Your Committee cannot but regret extremely that such a letter as that of the 26th of June should have been written by the Chief Registrar, not merely on account of the impropriety of its terms, but because the suggestion of retirement probably induced Mr. Wilde to apply at once for a pension, and thus frustrated the Lord Chancellor's declared intention of having the charges against Mr Wilde publicly heard in court. Mr. Wilde pressed your Committee to enter upon a further investigation of these charges; but, as there appeared to your Committee to be no ground whatever for any suspicion that there had been any improper motive for preferring the charges against Mr. Wilde; and as, moreover, the reports and documents (including Mr. Wilde's own explanatory statement) clearly supported those charges, at least to such a degree as to justify the Lord Chancellor in calling upon Mr. Wilde to answer them in open court; and further, as Mr. Wilde had himself chosen to retire on a pension rather than submit to a public inquiry into his conduct, your Committee refused to prolong an investigation, which, whatever its result might have been, must have been far less satisfactory in its nature than that which Mr. Wilde had declined."

On the second head of inquiry—the granting a pension to Mr. Wilde—the Committee report that "the haste and want of caution necessarily give rise to a suspicion that a vacancy in the office is the object sought rather than justice to the officer or the public. In this instance, however, your committee consider that no improper motives are to be imputed to the Lord Chancellor."

With regard to the third head of inquiry—Mr. Welch's appointment—the Committee were satisfied that no imputation could fairly be made against the Lord Chancellor, but they called attention to "some remarkable evidence touching this part of their inquiry." This evidence relates to money transactions between Mr. Welch and the Hon. R. Bethell, and the charge made by the Rev. R. Harding, vicar of St. Ann's, Wandsworth, that the Hon. R. Bethell was to use his influence with his father to secure an appointment for Mr. Welch, Mr. Welch paying £500 down and £1,000 on securing the appointment. The charge is denied by Mr. Welch and the Hon. R. Bethell. The Committee say:—

"Mr. Harding's statement, if true, discloses a corrupt bargain between the three parties: if false it is a gross attempt at extortion. One or other of these conclusions would be established by a judicial investigation of the facts of the case; but as each of them involves the liability to a charge of a highly penal character, your committee, not having the opportunity of examining witnesses upon oath, or of bringing the persons inculpated to a formal trial, purposely abstain from expressing any opinion as to which of the two views above mentioned ought to be adopted. They consider it their duty to observe, that the indisputable facts are such as to render it essential

to the public interest that the case should, as soon as possible, be made the subject of legal investigation."

On the fourth and last head of inquiry—whether Mr. Welch was to resign his appointment at Leeds in favour of Mr. Bethell, and receive another appointment in London—the Committee say :—

"In the month of May, 1864, the Lord Chancellor, on being informed that his son was deeply indebted, compelled him to resign his office of registrar in the Court of Bankruptcy. Mr. Bethell shortly afterwards went abroad with his family, and remained abroad during the summer and autumn. Towards the close of the year he returned to England, having formed a plan for making some arrangement with his creditors, and hoping to be reconciled to his father. Applications were made to the Lord Chancellor to induce him to relent in favour of his son, and give him some appointment. The Lord Chancellor was asked to appoint him to the office of clerk at the table of the House of Lords, which he peremptorily refused to do. He was asked by Mr. Miller to give his son the appointment of registrar in bankruptcy in London vacated by Mr. Slingsby Bethell, and Mr. Miller, in the hope that his request would be granted, but without any authority from the Lord Chancellor, prepared an order appointing Mr. Bethell to that office. The Lord Chancellor refused to make the appointment ; but upon a suggestion being made either by Mr. Skirrow (an intimate friend of the Lord Chancellor, and a trustee of Mr. Bethell's marriage settlement) or by Mrs. Bethell herself, that Mr. Bethell might be appointed to an office in the country, the Lord Chancellor appears, on February 22, 1865, at an interview with Mr. Skirrow, to have held out some expectation that he would consider the matter if Mr. Bethell could obtain a release from all his creditors ; up to that day he had peremptorily refused to entertain the subject. Mr. Skirrow's view was in favour of an office at Bristol, as being in the neighbourhood of Mrs. Bethell's relations. Later in the same day Mr. Bethell called on Mr. Skirrow, at Staple Inn, and probably then understood from him that there was some probability of his receiving an appointment in the country; Mr. Welch was then introduced to Mr. Skirrow by Mr. Bethell, and some remarks passed which showed that Mr. Bethell expected to obtain the office at Leeds, and Mr. Welch hoped to be transferred to London. Mr. Bethell went to Leeds on the following day; saw Mr. Welch at his office on the 24th; and it is clear that it was generally understood in the Bankruptcy Court at Leeds that Mr. Bethell was shortly to be appointed registrar there, and that Mr. Welch was to be transferred elsewhere.

"In the meanwhile Mr. Miller had been informed of the plan, and in full expectation that it would be carried into effect prepared two orders of appointment, one of Mr. Welch to the London registrarship, the other of Mr. Bethell to that at Leeds. He says that Mr. Skirrow gave him the information upon which he relied; but this Mr. Skirrow positively denies. Mr. Miller further states that he prepared the order before mentioned appointing Mr. Bethell to

the London registrarship, and the two orders last mentioned, without the knowledge of the Lord Chancellor, and that they were the only appointments ever prepared by him without the Lord Chancellor's sanction. The Lord Chancellor also states that he did not hear of these orders being prepared before this inquiry took place.

"On Sunday, the 26th, the Lord Chancellor, from some information which he had received as to his son's conduct at Paris, determined not to appoint his son to any office; he sent for Mr. Skirrow, and declared his decision.

"On Monday, the 27th, Mr. Miller was about to present the two appointments to the Lord Chancellor for signature. Mr. Skirrow saw him, and advised him not to do so, mentioning what had occurred on the previous day. Mr. Miller did not show the appointments, but mentioned the subject to the Lord Chancellor, who said that he would make no appointment.

"It appears to your Committee that Mr. Skirrow acted simply as a friend of the Lord Chancellor's family. No improper motive has been suggested for the part which Mr. Miller took, although his conduct in preparing the appointments without the sanction or even knowledge of the Lord Chancellor was highly reprehensible. Mr. Bethell and Mr. Welch were undoubtedly desirous of promoting the arrangement for their own interests; but the Lord Chancellor appears to have had no knowledge of the plan beyond the suggestion made to him by Mr. Skirrow and Mrs. Bethell, and no knowledge whatever of what had been done in expectation of its completion until some time after he had finally refused to make any appointment in favour of his son."

The Committee say in conclusion:—

"Your Committee, in performance of the duty entrusted to them, went fully into all the circumstances which seem to bear on any portion of the subject-matter; in their report, however, they have confined their observations to those points which they consider most material. They must be allowed to observe, in conclusion, that while the facts which they believe to be established by the evidence acquit the Lord Chancellor from all charge except that of haste and want of caution in granting a pension to Mr. Wilde; and although some of the questions asked in your honourable House, which led to the appointment of this Committee, were founded on information which was not thoroughly accurate, yet the general impression created by the sudden retirement of Mr. Wilde, and the pecuniary transactions which took place between Mr. Bethell and Mr. Welch, coupled with the representations made by Mr. Bethell on his visit to Leeds, were calculated to excite the gravest suspicions; and your Committee are of opinion that the inquiry which they have conducted was, for this reason, highly desirable for the public interests."

A resolution based on the report was moved by Mr. Hunt in the House of Commons on the 3rd of July, to which amendments were

proposed by the Lord Advocate and Mr. Bouverie. That of the former was negatived, but that of the latter was carried in the following form :—

"That this House, having considered the report of the Committee on the Leeds Bankruptcy Court, and the evidence taken before them, are of opinion that, while the evidence discloses the existence of corrupt practices with reference to the appointment of Patrick Robert Welch to the office of Registrar of the Leeds Bankruptcy Court, they are satisfied that no imputation can be fairly made against the Lord Chancellor with regard to that appointment ; and that such evidence, and also that taken before a Committee of the Lords, to inquire into the circumstances connected with the resignation by Mr. Edmunds of the offices held by him and laid before this House, show a laxity of practice and a want of caution with regard to the public interests on the part of the Lord Chancellor, in sanctioning the grant of retiring pensions to public officers against whom grave charges were pending which, in the opinion of this House, are calculated to discredit the administration of his great office."

On the following day the resignation of the Lord Chancellor was announced in both Houses of Parliament, and on the 6th, Lord Westbury himself explained to the House the particulars of his resignation. In the course of his speech his lordship said he might, however, express the hope that after an interval of time calmer thoughts would prevail and a more favourable view be taken of his conduct. He was thankful that he had had the opportunity of passing measures of useful reform, and of receiving approbation for measures which he believed would be productive of great benefit to the country. With these he hoped his name in time to come would be associated. He regretted deeply that that great measure he had at heart, the digest of the entire law, he had been unable to inaugurate, for it was not until the present Session that even the means were provided for it. He bequeathed that great scheme, already prepared, to the hands of his successor. With regard to the future he could only promise that it would be his zealous anxiety, in the character of a private member of that House, to promote and to assist in accomplishing all those reforms in the administration of justice which he felt to be so necessary. His lordship proceeded— "With respect to judgments in cases which have come before your lordships' House, I am happy to state that there is only one case upon which judgment has not been given, and in that the arguments were only concluded the day before yesterday. In the Court of Chancery, I have the satisfaction of stating that there will not remain one case unheard, or one judgment not given. My lords, I mention this that your lordships may understand that it has been my most earnest desire during the time I have been in office to give all the energy and industry I could to the public work. My lords, I have nothing more to do than to thank your lordships, which I do sincerely, for the kindness which I have received at your hands. It is very possible that by some word, by some inadvertence, or some

want of attention, I may have failed, or may have exposed myself to unfavourable construction. If that be the case, I beg of you to accept the expression of my regret, and I hope the incidents may be erased from your memory. My lords, I thank you for your attention."

SOCIAL SCIENCE ASSOCIATION.

The annual meeting of the Jurisprudence Department of the Association was held on the 19th June, Lord Brougham in the chair, to receive a report from the Standing Committee. The Committee congratulated the members on the success of the past Session, which commenced with the reception by the members of the illustrious advocate of the French Bar, M. Berryer, and of his colleague and friend M. Desmarest.

The report touched upon the various amendments which had been proposed and made in our Civil and Criminal jurisprudence, both in and out of Parliament, and the action which had been taken respecting them by the Association. A vote of thanks to Lord Brougham for his great services as President of the Department was passed and the meeting adjourned.

The annual dinner of the Department took place, on Saturday the 24th June, at the Ship Tavern, Greenwich, Lord Brougham, occupying the chair. Among the company present were: The Earl of Harrowby, Lord Denman, Sir John Shaw Lefevre, Baron de Gros, Sir Fitzroy Kelly, Q.C., M.P.; Mr. Locke, Q.C., M.P.; Mr. Shaw Lefevre, M.P.; Mr. Charles Neate, M.P.; Mr. George Harris; Mr. Serjeant Burke; Mr. Daniel, Q.C.; Mr. Thomas Webster, Q.C., F.R.S.; Dr. Waddilove, Dr. Pankhurst, Dr. Zimmermann, Dr. Pulling, Mr. R. R. Torrens, Mr. Joseph Parkes, Mr. Hastings, Mr. Hawes, Mr. Charles Clark, Mr. Edgar, &c. After the usual loyal and national toasts had been disposed of,

The noble Chairman gave the health of the united societies, and referring to the objects of the society now incorporated with the Social Science Association, and of which it had always formed an important department, he stated that its influence had been felt to a considerable extent in the legislation of the present session so far as it was connected with legal reforms. The present session had, he said, been fruitful of important law reforms. There was, for instance, the measure which had been passed for the concentration of the courts of law in one locality, and this he considered a step which was evidently calculated to lead to improvement in the administration of justice. A second measure was that of the extension of equitable jurisdiction to county courts, a measure which had been long called for, and which he considered as the necessary complement of the establishment of those useful courts. A third improvement had been made for reforming, to a certain extent, the municipal institutions of the country. The Social Science Association, and the society with which it was now connected, had been at all times consistent friends of progress, and they were both in favour of progress at a time when

their efforts in that direction created alarm in the minds of some, and led to the resistance of not a few ; but in the face of the fears of the one and the interested views of others, the societies had uniformly given their support to every reasonable measure of progress. Their mission in that respect was predicted by a great poet, of two centuries ago, who said—

> To draw forth good, lend struggling progress wings,
> These are imperial acts, and worthy kings.

The progress to which they had to lend wings was not that of reckless, extravagant theories of which persons who do not thoroughly understand were too often the clamouring advocates. The progress which they supported was a safe and good one ; they had experience to control, experience to suggest and to point out where errors had been committed, and which ought to be avoided in the future. They had heard a great deal of late and not a little at the present moment of a general election, in the midst of which, indeed, he might say we now are. The trouble, the great expense, and a great portion of the anxiety attending a general election had already begun, and he heartily wished members of the House of Commons fairly out of their troubles. A great deal was said just now about the extension of the right of voting. Without discussing that question, as a simply political one, he merely stated that he did not agree with those who were alarmed at the extension of the right of voting, for fear of the new voters coming in and swamping those who were already voters. There were two reasons why he had no fear on this ground—the first was that he did not believe the non-electors had any desire to overwhelm the present ones, and the second was that even if they had the wish they would not have the power of doing it. With respect to all the systems for furthering the progress of law amendment and other measures of social reform, he believed that the great bulk of the people were not sufficiently aware of the difficulties against which the promoters had to contend, and it frequently happened that the social reformer was too impatient, and wished to see his plans carried into effect with a rapidity which it was not possible to obtain. They wished to see their plans acted upon at once, were impatient of any delay, and would not wait the result of slow inquiry, sound advice, and the teachings of experience. Now, with respect to the question of the right of voting, he confessed that he would like to see one class above all others, who did not at present possess that privilege, in its enjoyment ; he referred to the skilled artisans. He drew a distinction between the common, ordinary, or unskilled workman and the skilled artisan, the latter being men upon whom the employer was really more dependent than the men were upon the masters. He thought that the right of voting might be safely given to such men, and he said he had often thought that if any test, such as that of the wage one, could be found, it might be very safely adopted. Any man who during any period, say for three months, had received

a certain amount of wages ought, he thought, to be put upon the register of voters, have his name enrolled thereon, and continue ever after to enjoy the rights and privileges of a voter. Among the changes during the present Session, of which he expressed his gratification, was that which had been made for the conduct of the great mass of private business which now came before both Houses of Parliament, and which had, he believed, been productive of considerable good. Some years since, when the Duke of Wellington was in office, a plan was proposed which, if adopted, would have been of very great value. The Duke requested him (Lord Brougham) to propose such a change in the standing orders of both Houses as would admit of the appointment of a joint committee of twelve, five Lords and seven Commons, to hear and report upon all matters of private legislation. He stated to the Duke that there would not be the slightest chance of such a measure being agreed to, but he was encouraged to make the trial, the Duke of Wellington saying that they could only be beaten, and if they were they could fall back upon some other plan. The result was as he (Lord Brougham) had anticipated; the plan was rejected, and another, though not so good as that which was first proposed, but which was still an improvement upon the then existing system, was adopted. He was still of opinion that the adoption of the plan of a joint committee would be of great service, and would obviate great loss of time, save wasteful expenditure, and the labour and anxiety to the promoters, of being, as they were now, compelled to appear before two separate committees upon the same matters of fact. The improvement of the mode of proceeding in respect to private bill legislation was a subject well worthy the attention of the society for the improvement of the law. The noble lord concluded by proposing the toast of "Prosperity to the two associations now united for the purpose of more united action."

Sir FITZROY KELLY, the Earl of HARROWBY, and others addressed the meeting, and after passing two or three formal resolutions the proceedings terminated.

APPOINTMENTS.

Lord Cranworth has been appointed Lord High Chancellor in the place of Lord Westbury, resigned.

Sir Edward Vaughan Williams, lately one of the Judges of the Court of Common Pleas, has been sworn in as one of Her Majesty's Privy Council.

Mr. J. A. Russell, of the Northern Circuit, has been appointed Recorder of Bolton, and Mr. Henry W. West, Attorney-General for the Duchy of Lancaster, Recorder of Manchester, in the place of Mr. R. B. Armstrong, Q.C., resigned.

Mr. Joseph Middleton, of the Northern Circuit, has been appointed to the Recordership of Scarborough, vacant by the appointment of Mr. West to the Recordership of Manchester.

Mr. James Caird, M.P., has been appointed Copyhold and Inclosure Commissioner in the place of the late Mr. Wingrove Cooke.

Mr. Thomas Collet Sanders, of Lincoln's Inn, has been appointed to the Readership on Constitutional Law and Legal History to the Inns of Court, vacant by the death of Mr. J. G. Phillimore, Q.C.

Mr. William Good, of the Middle Temple, has been appointed Inspector of Charities, vacant by the death of Mr. Simon, Jun.

The Lord Chancellor, Lord Cranworth, has appointed Mr. Lushington, of the Chancery Bar (son of the Right Hon. S. Lushington), to be his Chief Secretary; and Mr. Scott, of the Chancery Bar (who was formerly Secretary to Lord Chelmsford), to be his Second Secretary.

Mr. Alfred Hanson, of Lincoln's Inn, has been appointed Controller of Inland Revenue, in the place of Mr. Charles Trevor, resigned.

The Town Council of Leeds have appointed Mr. James Rider, Solicitor, one of the Public Prosecutors for the Borough.

IRELAND.—Mr. Charles Coates, Crown Prosecutor for Wicklow county, has been transferred to the Prosecutorship of the county and city of Waterford, vacant by the death of Mr. Edward Johnstone; Mr. William Ryan and Mr. William Anderson, have been appointed Crown Prosecutors to the county of Wicklow; Mr. Henry Devitt, to the county of Wexford: Mr. Valentine, B. Dillon, to county Sligo; Mr. Samuel Ferguson, Q.C., to county Armagh; Mr. James Kernan, Q.C., to county Antrim; Mr. Frederick W. McBlain, to county Down; Mr. Arthur Hamill, to county Monaghan; and Mr. Randal W. Macdonell, to county Louth.

Mr. Thomas H. Barton and Mr. Peirs F. White, have been appointed to the Law Professorships of King's Inn, Dublin, in the place of Mr. J. A. Byrne, and Mr. W. O'Connor Morris, whose terms of office have expired.

INDIA.—Mr. Elphinstone Jackson, of the Bengal Civil Service, has been appointed a Judge of the High Court of Judicature, at Fort William.

CHINA.—Edward Hutchinson Pollard, Esq., has been appointed one of Her Majesty's Counsel for Hong Kong.

ISLAND OF NEVIS.—William Chambers, Esq., has been appointed one of Her Majesty's Counsel for the Islands.

AUSTRALIA.—Mr. J. Stanley Dobson, of the Middle Temple, has been appointed to the Law Readership in the University of Melbourne, *vice* Mr. H. S. Chapman, appointed a judge in New Zealand.

BAR EXAMINATIONS.

The Council of Legal Education have awarded to John Naish, Esq. of Lincoln's Inn, the studentship of fifty guineas per annum; William Thomas Charley, of the Inner Temple, the exhibition of twenty-five guineas per annum; Mathew Ingle Joyce, Esq., of Lincoln's Inn, Challoner William Chute, Esq., of the Middle Temple, Reginald Montague Auber Branson, Esq., of the Middle Temple, certificates of honour.

The following gentlemen have passed the examination:—J. Matthias Spread, Esq., John Finlaison, Esq., A. W. T. Daniel, Esq., and De Grouchy Le Gallais, Esq., of Lincoln's Inn; John Henry De Villiers, Esq., Edward Cooper Willis, Esq., Thomas Snow, Esq., James Halket, Esq., George Clement Bertram, Esq., Henry James Burford Hancock, Esq., and Hugh Flemsteed Pigot, Esq., of the Inner Temple; and John Walton Teevan, Esq., David Lindsay Macafee, Esq., and Theodore Thomas, Esq., of the Middle Temple.

CALLS AT THE BAR.

Easter Term.

Inner Temple.—John Eldon Gorst, Esq.; Alfred Arthur Kaye Legge, Esq.; Charles Stuart Calverley, Esq.; Richard Hudson Smithett, Esq.; William John Smelter Cadman, Esq.; Henry Charles Geldart, Esq.; William Eustace Peacock, Esq.; Allan James Crosby, Esq.; Oliver Lodge, Esq.; and the Hon. Edward Stanhope.

Middle Temple.—William Joseph Cripps, Esq.; Joseph James Stuckey, Esq.; Digby Green, Esq.; Frederick Hamond, Esq.

Lincoln's Inn.—Louis Courtauld, Esq.; John Byers Gunning Moore, Esq.; Benjamin St. John Ackers, Esq.; George Cary, Esq.; Thomas Mansel Franklin, Esq.; and John Ratcliff Battersby. Esq.

Trinity Term.

Inner Temple.—William Thomas Charley, Esq., (Certificate of Honour, first class, Michaelmas Term, 1864, and holder of the Exhibition awarded in the present Trinity Term); Charles Jeffery, Esq.; Benjamin Guest, Esq.; Richard Masheder, Esq.; Henry Hibbert, Esq.; Robert Samuel Wright, Esq.; Donald Grant Macleod, Esq.; William Pharazyn, Esq.; John Hampson Jones, Esq.; William Alexander George Goodall, Esq.; Albert Hutton, Esq.; Walter Patrick Joseph Purcell, Esq.; Frederick Lee, Esq.; Hugh Flamsteed Pigot, Esq; Sir Charles Lawrence Young, Bart.; Owen Roberts, Esq.; John Macpherson, Esq.; Andrew Simon Lamb, Esq.; Robert William Trouche, Esq.; George Clement Bertram, Esq.; Henry William Verey, Esq.; Charles Herbert Mallock, Esq.; and George Cockle, Esq.

MIDDLE TEMPLE.—Thomas Noon Talfourd, Esq.; John Wilson Gray, Esq. (of the Irish Bar); David Lindsay Macafee, Esq.; Frederick Baruch Toogood, Esq.; George Edwardes Dering, Esq.; Joseph Vere Woodman, Esq.; Richard Scott Kisbey, Esq.; Horatio Lucas Trenerry, Esq.; Cecil Augustus Blake, Esq.; James Henry Minus, Esq.; William Jackson, Esq.; Charles Jones Nixon, Esq.; George Henry Haydon, Esq.; Jean Emile Floreus, Esq.; Martin William M'Kellar, Esq.; Charles Martin Gibson, Esq.; William Beaumont Bagnall, Esq.; George William Marshall, Esq.; George Humphrey Chapman, Esq.; Thomas Lionel Jenkins, Esq.; Hugh Davidson, Esq.; Henry Martin Franz Lumley, Esq.; Louis Arthur Goodeve, Esq.; William Cockerell, Esq.; Maurice Edmund Piston, Esq.; George John Curran, Esq.

LINCOLN'S INN.—James Liddell Purves, Esq.; Matthew S. Grosvenor Woods, Esq.; Edward Samuel Farrier Moore, Esq.; Andrew Anderson, Esq.; Kenyon Wood Wilkie, Esq.; John Matthias Spread, Esq.; Thomas Smyth Abraham, Esq.; Archibald Hyndman Stein, Esq.; George Daw, Esq.; John Power Hicks, Esq.; Archibald Edward Dobbs, Esq.; Edmund Fuller Griffin, Esq.; John Finlaison, Esq.; William Gerald Seymour S. Fitz-Gerald, Esq.; John Lodwick Warden, Esq.; Edward Garnet Man, Esq.; William Henry Mitchell, Esq.; and Henry Francis Mutukisna, Esq.

GRAY'S INN.—John Hawtrey Thwaites, Esq.; Rowland Wilkinson, Esq.; John Jenkins, Esq.; Robert Carr Woods, jun., Esq.; Iltudus Thomas Prichard, Esq.; and Francisco Evaristo Pereira, Esq.

EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

Easter Term, 1865.

AT the final examination of candidates for admission on the roll of attorneys and solicitors of the superior courts, the examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—Arthur Wightman; Leslie Hunter; Francis Roper Larken; Edmund Archibald Stamp.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books:—To Mr. Wightman, the Prize of the Honourable Society of Clifford's Inn; to Mr. Hunter, Mr. Larken, and Mr. Stamps, each one of the Prizes of the Incorporated Law Society.

The examiners have also certified that the following candidates, under the age of 26, whose names are placed in alphabetical order,

passed examinations which entitle them to commendation :—John James Amos ; Thomas Bury ; Watson Robert Jones ; James Biggs Porter ; and Hugh Tilsley. The council have accordingly awarded them certificates of merit.

The examiners have further announced to the following candidates, that their answers to the questions at the examination were highly satisfactory, and would have entitled them to prizes or certificates of merit if they had not been above the age of 26 :—Charles Leonard Mesnard ; Frederick Richard Kilvington ; John Paul Poncione, jun., and William Smale.

The number of candidates examined in this term was 112 ; of these, 109 were passed, and 3 postponed.

Trinity Term, 1865.

At the final examination of candidates for admission on the roll of attorneys and solicitors of the superior courts, the examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction :—

John Crick Freeman, William Holmes, Francis Cooper Dumville Smythe, William George Chambers, Samuel Parks Clare, and Walter Taylor.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books :—To Mr. Freeman, the prize of the Honorable Society of Clifford's Inn. To Mr. Holmes, Mr. Smythe, Mr. Chambers, Mr. Clare, and Mr. Taylor, each, one of the prizes of the Incorporated Law Society.

The examiners have also certified that the following candidates, under the age of 26, whose names are placed in alphabetical order, passed examinations which entitle them to commendation :—Thomas Frederic Artingdale, Herbert Bramley, Frederick Corbett, Samuel John Daw, jun., Wlliam Edward Marsh, and Henry John Tweedy.

The council have accordingly awarded them certificates of merit.

The examiners have further announced to the following candidates, that their answers to the questions at the examination were highly satisfactory, and would have entitled them to prizes if they had not been above the age of 26 :—Francis Buckland, and John Edward Thorley Graham.

The number of candidates examined in this term was 157 ; of these, 143 were passed, and 14 postponed.

THE NEW HOUSE OF COMMONS.

Appended is a complete list of the members returned to the new House of Commons. The names of *new* members are preceded by an asterisk :—

Abingdon	*Col. Lindsay	C
Andover	Hn. D. Fortescue	L
	W. Humphrey	C
Anglesea	Sir R. Bulkeley	L
Arundel	Lord E. Howard	L
Ashburton	*Jardine	L
Ashton-under-Lyne	Milner Gibson	L
Aylesbury	S. G. Smith	C
	*N. M. Rothschild	L
Banbury	*Samuelson	L
Barnstaple	*Sir G. Stucley	C
	*T. Cave	L
Bath	W. Tite	L
	*Colonel Hogg	C
Beaumaris	W. O. Stanley	L
Bedford	Saml. Whitbread	L
	Col. Stuart	C
Bedfordshire	Col. Gilpin	C
	H. Russell	L
Berkshire	R. Benyon	C
	*Sir C. Russell	C
	*Col. Lindsay	C
Berwick	D. E. Majoribanks	L
	*A. Mitchell	L
Beverley	Col. Edwards	C
	*C. Sykes	C
Bewdley	Sir T. Winnington	L
Birkenhead	John Laird	C
Birmingham	John Bright	L
	Wm. Scholefield	L
Blackburn	W. H. Hornby	C
	*T. Fielden	C
Bodmin	L. Gower	L
	James Wyld	L
Bolton	Captain Gray	C
	T. Barnes	L
Boston	T. W. Malcolm	C
	*T. Parry	L
Bradford	H. W. Wickham	L
	W. E. Forster	L
Brecknock	Colonel Watkins	L
Brecknockshire	G. Morgan	C
Bridgewater	A. W. Kinglake	L
	*Westropp	C
Bridgnorth	John Pritchard	L
	*Sir J. Acton	L
Bridport	T. A. Mitchell	L
	K. D. Hodgson	L
Brighton	James White	L
	*Henry Fawcett	L
Bristol	H. Berkeley	L
	*Sir S. M. Peto	L
Buckingham	Sir H. Verney	L
	J. G. Hubbard	C
Buckinghamsh.	Benj. Disraeli	C
	C. G. Du Pré	C
	R. B. Harvey	C
Bury	*R. Philips	L
Bury St. Edmds.	J. A. Hardcastle	L
	*Green	C
Calne	Rt. Hon. R. Lowe	L
Cambridge	*W. Forsyth, Q.C.	C
	F. S. Powell	C
Cambridgshire	*Lord Royston	C
	Ld. G. Manners	C
	*Young	L
Cambridge Uni.	Rt. Hn. T. H. Walpole, Q.C.	C
	C. T. Selwyn, Q.C.	C
Canterbury	B. Johnstone	C
	*J. Huddlestone, Q.C.	C
Cardiff	Col. Stuart	L
Cardigan	Captain Pryse	L
Cardiganshire	*Sir T. Lloyd	L
Carlisle	*W. N. Hodgson	C
	E. Potter	
Carmarthen	W. Morris	L
Carmarthensh.	D. Jones	C
	D. Pugh	C
Carnarvon	*W. B. Hughes	L
Carnarvonshire	E. G. Pennant	C
Chatham	*A. Otway	L
Cheltenham	*C. Schreiber	C
Chester	Earl Grosvenor	L
	*W. H. Gladstone	L
Cheshire, N.	G. C. Legh	C
	W. Egerton	C
Cheshire, S.	Sir P. Egerton	C
	J. Tollemache	C
Chichester	Lord H. Lennox	C
	J. A. Smith	L
Chippenham	*Goldney	C
	*Sir J. Neeld	C

Christchurch	Admiral Walcott	C
Cirencester	A. Bathurst	C
	*Hon. R. Dutton	C
Clitheroe	.*R. Fort	L
Cockermouth	Lord Naas	C
	John Steel	L
Colchester	.*J. G. Rebow	L
	*T. J. Miller	C
Cornwall, E.	T. A. Robartes	L
	N. Kendall	C
Cornwall, W.	J. St. Aubyn	L
	R. Davey	L
Coventry	M. Treherne	C
	H. W. Eaton	C
Cricklade	A. L. Goddard	C
	*— Gooch	C
Cumberland, E.	C. Howard	L
	W. Marshall	L
Cumberland, W.	Capt. Lowther	C
	P. Wyndham	C
Dartmouth	J. Hardy	C
Denbigh	T. Mainwaring	C
Denbighshire	Sir W. Wynne	C
	Col. Biddulph	L
Derby	M. T. Bass	L
	*W. T. Cox	C
Derbyshire, N.	Ld. G. Cavendish	L
	*W. Jackson	L
Derbyshire, S.	T. W. Evans	L
	*— Colville	L
Devizes	Sir T. Bateson	C
	Darby Griffith	C
Devonport	W. B. Ferrand	C
	*— Fleming	C
Devonshire, S.	Sir L. Palk	C
	S. T. Kekewich	C
Devonshire, N.	C. H. Trefusis	C
	*T. D. Acland	L
Dorchester	R. B. Sheridan	L
	Colonel Sturt	C
Dorsetshire	W. H. Portman	L
	H. G. Sturt	C
	J. Floyer	L
Dover	.*C. Freshfield	C
	*Col. Dickson	C
Droitwich	Sir J. Pakington	C
Dudley	H. B. Sheridan	L
Durham	J. Henderson	L
	Rt. Hon. J. Mowbray	C
Durham, N.	Sir H. Williamson	L
	R. D. Shafto	L
Durham, S.	.*H. Pease	L
	*Captain Surtees	C
Essex, N.	C. Ducane	C
	*Sir T. Western	L
Essex, S.	.*Lord E. Cecil	C
	*H. J. Selwin	C
Evesham	Capt. Bourne	C
	W. Holland	L
Exeter	Ld. Courtenay	C
	*J. D. Coleridge, Q.C.	L
Eye	E. Kerrison	C
Falmouth	T. G. Baring	L
	S. Gurney	L
Finsbury	.*T. M. Torrens	L
	*Ald. Lusk	L
Flint	Sir J. Hanmer	L
Flintshire	Ld. R. Grosvenor	L
Frome	.*Sir H. Rawlinson	
Gateshead	Rt. Hon. W. Hutt	L
Glamorgansh.	C. R. M. Talbot	L
	H. Vivian	L
Gloucester	.*W. Price	L
	*C. J. Monk	L
Gloucestersh. E.	Sir M. Beach	C
	R. S. Holford	C
Gloucester W.	J. Rolt, Q.C.	C
	Lt. Col. Kingscote	L
Grantham	.*J. H. Thorold	C
	W. E. Gregory	C
Greenwich	Ald. Salomons	L
	*Sir C. Bright	L
Grimsby	.*J. Fildes	L
Guildford	G. Onslow	L
	W. Bovill, Q.C.	C
Halifax	J. Stansfeld	L
	*E. Akroyd	L
Hampshire, N.	W. B. Beach	C
	G. S. Booth	C
Hampshire S.	Sir J. Jervoise	L
	Col. H. Fane	C
Harwich	Capt. Jervis	C
	*— Kelk	C
Hastings	W. Leslie	L
	*J. Robertson	C
Haverfordwest.	J. H. Scourfield	C
Herefordshire	M. Biddulph	L
	J. K. King	C
	*Sir J. Bailey	C
Hereford	.*R. Baggally, Q.C.	C
	G. Clive	L
Hertfordshire	.*W. Cowper	L
	H. G. Surtees	C
	Sir E. B. Lytton	C
Hertford	Rt. Hon. W. Cowper	L
	M. Farquhar	C
Helstone	.*— Young	L
Honiton	A. B. Cochrane	C
	*F. D. Goldsmid	L

Horsham .	.*— Hurst	L
Huddersfield	.*Col. Crosland	L
Hull . . .	. J. Clay	L
	*Norwood	L
Huntingdon	. General Peel	C
	T. Baring	C
Huntingdonsh.	E. Fellowes	C
	Lord R. Montagu	C
Hythe . .	. Baron Rothschild	L
Ipswich . .	. S. Adair	L
	J. C. Cobold	C
Kendal . .	. G. C. Glyn	L
Kent, East	. Sir B. Bridges	C
	Sir E. Dering	L
Kent, West	. Lord Holmesdale	C
	*Hart Dyke	C
Kidderminster.	*A. Grant	C
Knaresboro'	. B. T. Woodd	C
	*J. Holden	L
Lambeth .	.*T. Hughes	L
	F. Doulton	L
Lancashire, N.	Mrq. of Hartington	L
	Col. Patten	C
Lancashire, S.	.*W. E. Gladstone	L
	A. F. Egerton	C
	C. Turner	C
Lancaster .	. E. Fenwick	L
	H. W. Schneider	L
Launceston	.*A. Campbell	C
Leeds . .	. Edwd. Baines	L
	G. S. Beecroft	C
Leicester .	. J. D. Harris	L
	P. A. Taylor	L
Leicestersh., S.	C. Packe	C
	Lord Curzon	C
Leicestersh. N.	Lord J. Manners	C
	E. B. Hartopp	C
Leominster	. G. Hardy	C
	*— Walsh	C
Lewes . .	.*Lord Pelham	L
	Hon. H. B. Brand	L
Lichfield .	. Major Anson	L
	*Colonel Dyott	C
Lincoln . .	. C. Seely	L
	*— Heneage	L
Lincolnshire, N.	Sir M. Cholmeley	L
	J. B. Stanhope	C
Lincolnshire, S.	Sir J. Trollope	C
	Col. Packe	L
Liskeard .	. Sir A. Buller	L
Liverpool .	. B. Horsfall	C
	T. Graves	C
London . .	. R. W. Crawford	L
	L. Rothschild	L
	G. I. Göschen	L
	*Ald. Lawrence	L
Ludlow . .	. Capt. Clive	C
	*— Severne	C
Lyme Regis	.*J. W. Treeby	C
Lymington	. W. Mackinnon	L
	Lord G. Lennox	C
Lynn . .	. Lord Stanley	C
	*Sir T. Buxton	L
Macclesfield	. T. Brocklehurst	L
	E. C. Egerton	C
Maidstone .	. W. Lee	L
	*J. Whatman	L
Maldon . .	. G. W. Peacocke	C
	*R. A. Earle	C
Malmesbury	. Lord Andover	L
Malton . .	. C. W. Fitzwilliam	L
	J. Brown	L
Manchester	. T. Bazley	L
	*E. James, Q.C.	L
Marlborough	. Lord E. Bruce	L
	H. B. Baring	L
Marlow . .	. Col. B. Knox	C
	Col. Williams	C
Marylebone	. H. Lewis	L
	*T. Chambers, Q.C.	L
Merionethshire	*W. W. E. Wynne	C
MerthyrTydvil	H. A. Bruce	L
Middlesex .	. R. Hanbury	L
	Lord Enfield	L
Midhurst .	. W. T. Mitford	C
Monmouthshire	C. O. Morgan	C
	P. G. Somerset	C
Monmouth .	. C. Bailey	C
Montgomery	. C. H. Tracy	L
Montgomerysh.	C. W. Wynne	C
Morpeth .	. Sir G. Grey	L
Newark . .	. G. Hodgkinson	L
	*Lord A. Clinton	L
Nc'stle-on-Tyne	T. Headlam, Q.C.	L
	*C. Cowen	L
Nc'stle-u-Line	*— Buckley	C
	*— Allen	L
Newport, I. of W	*C. W. Martin	L
	R. W. Kennard	C
Norfolk, East	E. Howes	C
	*— Read	C
Norfolk, West	*W. Bagge	C
	*T. De Grey	C
Northallerton	.*C. M. Mills	C
Northampton	. Lord Henley	L
	C. Gilpin	L
Northampton. N.	Lord Burghley	C
	G. W. Hunt	C
Northampton, S.	Sir R. Knightley	C
	Col. Cartwright	C
Northmbrld., N.	Lord H. Percy	C
	Sir M. W. Ridley	C
Northmbrld., S.	W. B. Beaumont	L
	H. G. Liddell	C
Norwich . .	E. Warner	L
	Sir W. Russell	L

Nottingham	.*S. Morley	L
	Sir R. Clifton	L
Notts., N. .	. J. E. Denison	L
	Lord Clinton	L
Notts., S. .	. W. H. Barrow	C
	Lord Stanhope	C
Oldham . .	. J. T. Hibbert	L
	*— Platt	L
Oxford . .	. E. Cardwell	L
	C. Neate	L
Oxfordshire	. J. W. Henley	C
	Col. North	C
	Col. Fane	C
Oxford Univer.	Sir W. Heathcote	C
	*G. Hardy	C
Pembrokeshire	G. L. Phillips	C
Pembroke . .	Sir H. Owen	L
Peterborough	G. H. Whalley	L
	T. Hankey	L
Petersfield .	. Sir W. Jolliffe	C
Plymouth .	. R. P. Collier, S.G.	L
	W. Morrison	L
Pontefract .	. H. C. E. Childers	L
	S. Waterhouse	C
Poole . .	. H. D. Seymour	L
	*— Waring	L
Portsmouth	.*Serjeant Gaselee	L
	*W. H. Stone	L
Preston . .	. Sir. T. Hesketh	C
	*Captain Stanley	C
Radnorshire	. Sir J. Walsh	C
Radnor . .	. R. G. Price	L
Reading . .	. Sir F. Goldsmid, Q.C.	L
	J. S. Lefevre	L
Reigate . .	. G. L. Gower	L
Retford, E.	. Lord Galway	C
	F. S. Foljambe	L
Richmond .	. Sir R. Palmer, A.G.	L
	*J. C. Dundas	L
Ripon . .	.*Sir C. Wood	L
	*Capt. Kearsley	L
Rochdale .	. T. B. Potter	L
Rochester .	. P. W. Martin	L
	Serjt. Kinglake	L
Rutlandshire	. G. J. Noel	C
	G. H. Heathcote	L
Rye . . .	. W. A. Mackinnon	L
Salford . .	. J. Cheetham	L
Salisbury .	. M. H. Marsh	L
	*E. Hamilton	L
Sandwich .	. E. K. Hugessen	L
	Lord C. Paget	L
Scarborough	*Sir J. Johnstone	L
	*J. D. Dent	L
Shaftesbury	. G. Glynn	L
Sheffield .	. A. Roebuck, Q.C.	L
	*G. Hadfield	L
Shoreham .	. S. Cave	C
	Sir P. Burrell	C
Shrewsbury	. G. Tomline	L
	*W. J. Clement	L
Shropshire, N.	J. R. O. Gore	C
	*Major Cust	C
Shropshire, S.	.*R. J. More	L
	*Col. Herbert	C
Somerset., E.	.*N. Greville	C
	*R. Paget	C
Somerset., W.	. Sir A. B. Hood	C
	W. H. Langton	C
Southampton	.*R. Gurney, Q.C.	C
	*G. Moffatt	L
South Shields	. R. Ingham, Q.C.	L
Southwark .	. A. H. Layard	L
	J. Locke, Q.C.	L
Stafford . .	.*M. A. Bass	L
	*Capt. Meller	C
Stafford., N.	.*E. Buller	L
	C. B. Adderley	C
Stafford., S.	W. O. Foster	L
	H. Foley	L
Stamford .	. Lord Cranbourne	C
	Sir S. Northcote	C
St. Ives . .	. H. Paull	C
Stockport .	. J. B. Smith	L
	E. W. Watkin	L
Stoke-Trent	. H. Grenfell	L
	*B. Hope	C
Stroud . .	. E. Horsman	L
	G. P. Scrope	L
Suffolk, W.	. Major Parker	C
	L. A. Harvey	C
Suffolk, East	. Lord Henniker	C
	Sir F. Kelly, Q.C.	C
Sunderland	. H. Fenwick	L
	*Ald. Hartley	C
Surrey, W.	. G. Briscoe	L
	G. Cubitt	C
Surrey, East.	. P. Locke King	L
	*C. Buxton	L
Sussex, W.	. N. B. Bartelott	C
	H. Wyndham	C
Sussex, E. .	. J. G. Dodson	L
	*Ld. E. Cavendish	L
Swansea .	. L. L. Dillwyn	L
Tamworth .	. Sir R. Peel	L
	J. Peel	L
Taunton .	. C. Barclay	L
	Lord W. Hay	L
Tavistock .	. A. Russell	L
	*— Samuda	L

Tewkesbury	.*W. Dowdeswell	C
	J. R. Yorke	C
Thetford . .	A. H. Baring	C
	*R. Harvey	C
Thirsk . . .	Sir W. Gallwey	C
Tiverton . .	Lord Palmerston	L
	*J. W. Walrond	C
Totnes . . .	A. Seymour	L
	J. Pender	L
Tower Hamlets	C. S. Butler	L
	A. S. Ayrton	L
Truro . . .	.*Captain Vivian	L
	F. Williams	C
Tynemouth	.*G. Trevelyan	L
Wakefield .	.*W. Leatham	L
Wallingford	.*Sir W. Dilke	L
Walsall . . .	C. Forster	L
Wareham .	.*J. H. Calcraft	L
Warrington	. G. Greenall	C
Warwick .	.*A. W. Peel	L
	G. W. J. Repton	C
Warwicksh., N	C. Newdegate	C
	D. Bromley	C
Warwicksh., S	*— Wise	C
	Sir C. Mordaunt	C
Wells . . .	Captain Jolliffe	C
	*Captain Hayter	L
Wenlock . .	Hon. G. Forester	C
	M. Gaskell	C
Westbury . .	Sir M. Lopes	C
Westminster	.*Capt. Grosvenor	L
	*J. S. Mill	L
Westmoreland	H. Lowther	C
	Lord Bective	C
Weymouth. .	R. Brooks	C
	*H. G. Gridley	L
Whitby . .	.*Bagnall	C
Whitehaven	.*G. C. Bentinck	C
Wigan . . .	General Lindsay	C
	H. Woods	L
Wight, Isle of	*Sir J. Simeon	L
Wilton . . .	E. Antrobus	C
Wiltshire, N	.*Lord C. Bruce	L
	R. P. Long	C
Wiltshire, S	. Lord H. Thynne	L
	*T. F. Grove	L
Winchester	. J. B. Carter	L
	*W. B. Simmons	C
Windsor .	.*H. Labouchere	L
	*Sir H. Hoare	L
Wolverhampton	C. P. Villiers	L
	T. W. Weguelin	L
Woodstock	.*H. Barnett	C
Worcester .	.*N. Sherriff	L
	R. Padmore	L
Worcestersh. E.	H. Vernon	L
	F. Calthorpe	L
Worcestersh. W.	F. Lygon	C
	F. W. Knight	C
Wycombe . .	J. R. Mills	L
	*C. Carrington	L
Yarmouth . .	Sir E. Lacon	C
	*J. Goodson	C
York . . .	.*— Lowther	C
	*Ald. Leeman	L
Yorksh. N. W. R.	Sir F. Crossley	L
	Lord Cavendish	L
Yorksh., E. R.	Lord Hotham	C
	A. Duncombe	C
Yorksh., N. R.	*F. Milbanke	L
	W. E. Duncombe	C
Yorksh. S. W. R.	*Lord Milton	L
	*H. F. Beaumont	L

IRELAND.

Antrim Co.	E. O'Neill	C
	*— Seymour	C
Armagh . .	S. B. Miller, Q.C.	C
Armagh Co.	Sir W. Verner	C
	Col. Stronge	C
Athlone . .	.*— Reardon	L
Bandon . .	Hon. H. Bernard	C
Belfast . .	Sir H. Cairns, Q.C.	C
	S. G. Getty	C
Carrickfergus	R. Torrens	C
Carlow . .	.*O. Stock	L
Carlow Co.	H. Bruen	C
	Capt. Beresford	C
Cashel . .	.*O. Beirne	L
Cavan Co. .	Capt. Annesley	C
	*— Sanderson	L
Clare Co. .	Col. Vandeleur	C
	Sir C. O'Loghlen, Q.S.	L
Clonmel . .	J. Bagwell	L
Coleraine .	H. H. Bruce	C
Cork . . .	.*J. F. Maguire	L
	N. D. Murphy	L
Cork Co. .	.*— Barry	
	N. Leader	C
Donegal Co.	Viscnt. Hamilton	C
	I. Conolly	C
Downpatrick	D. S. Kerr	C
Down Co. .	Lord Hill Trevor	C
	Lieut. Col. Forde	C
Drogheda .	.*— Whitworth	L
Dublin Uni.	.*Rt. Hon. J. Whiteside, Q.C.	C
	*A. Lefroy	C
Dublin . .	.*B. L. Guinness	L C
	J. Pym	L
Dublin Co.	Col. Taylor	C
	I. T. Hamilton	C
Dundalk .	Sir G. Bowyer	L
Dungannon	W. S. Knox	C
Dungarvan .	.*C. Barry, Q.C.	L
Ennis . .	Capt. Stackpoole	L
Enniskillen	Hon. J. Cole	C
Fermanagh Co.	Capt. Archdall	C
	Col. Cole	C
Galway . .	.*O. Morris, Q.C.	L
	*Sir S. Blennerhasset	L
Galway Co.	.*Lord Dunkelin	L
	W. H. Gregory	L
Kerry Co. .	H. Herbert	L
	Vis. Castlerosse	L
Kildare Co.	W. H. Cogan	L
	*Ld. O. Fitzgerald	L
Kilkenny . .	Hon. A. Ellis	L
	*— Bryan	L
Kilkenny .	.*Sir J. Gray	L
King's Co. .	.*J. W. King	C
	Sir P. O'Brien, Bt.	L
Kinsale . .	Sir G. Colthurst	L
Leitrim Co.	W. O. Gore	C
	J. Brady	L
Limerick City	F. W. Russell	L
	Major Gavin	L
Limerick Co. .	W. Monsell	L
	— Synan	L
Lisburn . .	E. W. Verner	C
L'd'nderry City	*Ld C. J. Hamilton	C
L'd'nderry Co.	Sir F. W. Heygate	C
	R. P. Dawson	C
Longford City	Col. Greville	L
	M. O'Reilly	L
Louth Co. . .	C. Fortescue	L
	— Kennedy	L
Mallow . .	.*Serjt. Sullivan	L
Mayo Co. . .	Ld. J. Browne	L
	*Ld. Bingham	L
Meath Co.	M. Corbally	L
	E. M'Evoy	L
Monaghan Co.	Col. Leslie	C
	*Hon. V. Dawson	L
New Ross.	Col. Tottenham	C
Newry . . .	— Innes	C
Portarlington	J. C. Lawson, Q.C.	L
Queens' Co.	Col. Dunne	C
	— Fitzpatrick	L
Roscmn. Co.	.*O'Connor Don	L
	*Col. French	L
Sligo . .	.*Serjt. Armstrong	L
Sligo Co. .	Sir R. Booth	C
	— Cooper	C
Tipperary Co.	*— Moore	L
	*J. B. Dillon	L
Tyrone Co.	Ld. C. Hamilton	C
	T. L. Corry	C
Tralee . . .	O'Donoghue	L
Waterford . .	J. A. Blake	L
	H. W. Barrow	L
Waterford Co.	J. Esmonde	L
	Lord Tyrone	C
Wexford . .	— Devereux	L
Wexford Co.	J. George	C
	*Sir J. Power	L
Westmeath Co.	W. P. Urquhart	L
	*Col. Greville	L
Wicklow Co.	.*W. F. Dick	C
	Lord Proby	L
Youghal .	.*— M'Kenna	L

SCOTLAND.

Aberdeen . .	Col. Sykes	L
Aberdeenshire	W. Leslie	L
Argyleshire .	A. S. Finlay	L
Ayr Burghs .	E. H. J. Crauford	L
Ayrshire . .	Sir J. Fergusson	C
Banffshire . .	R. W. Duff	L
Berwickshire .	D. Robertson	L
Buteshire . .	*W. Lamont	L
Clackmannan .	W. P. Adam	L
Caithnesshire	G. Trail	L
Dumbartonsh. .	P. B. Smollett	C
	*J. Stirling	L
Dumfries . .	W. Ewart	L
Dumfriesshire	*Major Walker	C
Dundee . . .	Sir J. Ogilvy	L
Edinburgh . .	J. Moncrieff	L
	*D. M'Laren	L
Edinburghshire	Earl Dalkeith	C
Elgin Burgh .	Grant Duff	L
Elgin & Nairn	C. Bruce	C
Falkirk Burghs	J. Merry	L
Fifeshire . .	Sir R. Anstruther	L
Forfarshire . .	C. Carnegie	L
Glasgow . .	J. Dalglish	L
	*W. Graham	L
Greenock . .	A. M. Dunlop	L
Haddington B.	Sir H. F. Davie	L
Haddingtonsh.	Lord Elcho	L
Inverness Bghs.	A. Matheson	L
Inverness-sh. .	H. J. Baillie	C
Kilmarnock B.	E. P. Bouverie	L
Kirkcaldy Bghs.	Aytoun	L
Kincardinesh. .	*R. D. Nicol	L
Kirkcudbright.	J. Mackie	L
Lanarkshire .	Sir T. Colebrooke	L
Linlithgowsh. .	*P. M'Lagan	L
Leith Burghs .	W. Miller	L
Montrose . .	W. E. Baxter	L
Orkney . . .	F. Dundas	L
Paisley . . .	C. Ewing	L
Peebleshire .	Sir G. Montgomery	L
Perthshire . .	W. Stirling	C
Perth . . .	Hon. A. Kinnaird	L
Ross, &c. . .	Sir J. Matheson	L
Roxburghsh. .	Sir W. Scott	L
Renfrewshire .	*Capt. Spiers	L
Selkirkshire .	Lord H. Scott	L
Stirlingshire .	Adml. Erskine	L
Sutherlandshire	Sir D. Dundas	L
St. Andrew's .	E. Ellice	L
Stirling Brghs.	*L. Oliphant	L
Wick Burghs .	*S. Laing	L
Wigton Burgh.	Sir J. Young	L
Wigtonshire .	Sir A. Agnew	L

Necrology.

March.

2nd. LEVINGE, HON. E. P., Justice of the Supreme High Court, Calcutta.

April.

2nd. SWAYNE, J., Esq., late Clerk of the Peace for Wilts, aged 88.
17th. ASPREY, F., Esq., Solicitor, aged 30.
22nd. MARKBY, E. G., Esq., Solicitor, aged 63.
25th. LASCELLES, Hon. E., D.C.L., Chairman of West Riding and York Quarter Sessions, aged 66.
27th. YORKE, HENRY, Esq., Solicitor, aged 44.
27th. PHILLIMORE, J. G., Esq., Q.C., Reader on Constitutional Law and Legal History to the Inns of Court.

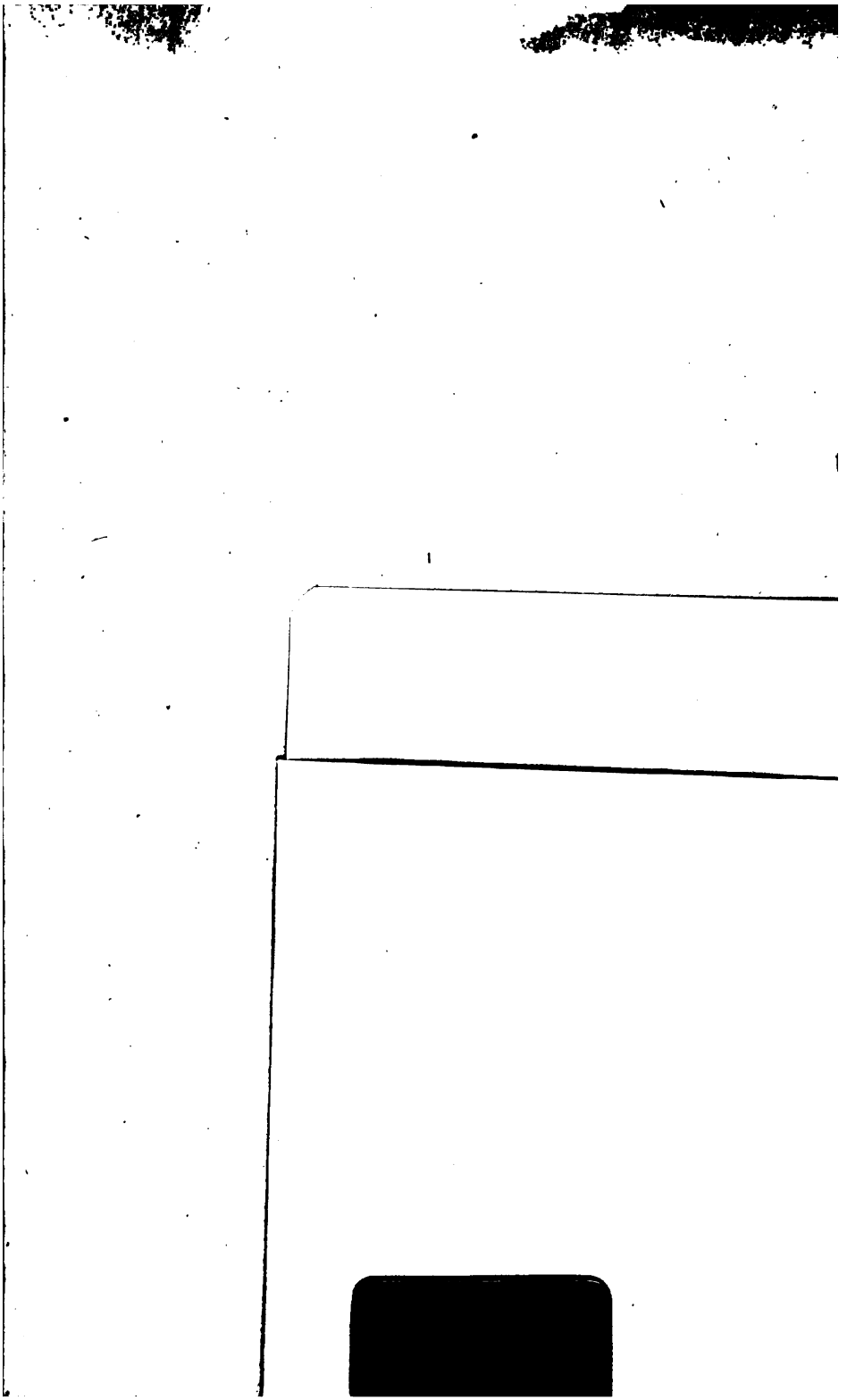
May.

3rd. STREET, HON. J. A., late Attorney-General for New Brunswick.
3rd. MARTELL, C., Esq., Solicitor, aged 48.
8th. WESTON, GEORGE, Esq., Barrister-at-Law, aged 60.
9th. OGDEN, JOHN, Esq., Barrister-at-Law, Clerk of the Peace for Manchester, aged 62.
10th. BLACKBURN, JOHN, Esq., Solicitor, aged 59.
12th. TREVELYAN, R., Esq., Barrister-at-Law, aged 84.
13th. BRAMLEY, EDWARD, Esq., Solicitor, aged 59.
18th. DEAN, J. W., Esq., Solicitor.
21st. ERSKINE, HENRY, J., Esq., Barrister-at-Law.
27th. NEVILL, R., Esq., Solicitor, aged 89.
27th. FINCH, GEORGE, Esq., Solicitor.
30th. TIDSWELL, B. K., Esq., Solicitor, aged 49.
31st. BERRIDGE, S., Esq., Solicitor, aged 41.

June.

9th. ROLTON, WILLIAM, Esq., Barrister-at-Law, aged 39.
12th. NEALE, J., Esq., Solicitor, aged 65.
15th. BOWER, G., Esq., Solicitor, aged 67.
18th. BEST, J., Esq., Barrister-at-Law, aged 44.
18th. COOKE, GEORGE WINGROVE, Esq., Copyhold and Inclosure Commissioner, aged 52.
19th. FENTON, J. H. W., Esq, Barrister-at-Law, aged 32,
19th. BROOKS, J., Esq., Solicitor, aged 83.
22nd. BAKER, W., Esq., Solicitor, aged 69.
24th. PIGGOTT, S. F., Esq., Barrister-at-Law, aged 71.
28th. FOULGER, C., Esq., Solicitor, aged 49.
28th. MCCORD, Hon. J. S., Judge of the Superior Court for Lower Canada, aged 64.
29th. BRIDGES, J., Esq., Solicitor, aged 78.

July.

5th. BRADLEY, W. J., Esq., Solicitor, aged 71.
6th. MILLETT, Richard, Esq., Solicitor.
7th. BIRD, W. G., Esq., Barrister-at-Law, aged 29.
7th. PATTEN, J. C., Esq., Barrister-at-Law, aged 27.
7th. WILLIAMS, A. K., Esq., Solicitor.
11th. BURKITT, John Lowe, Esq., Solicitor.

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